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NATO'S ROLE IN PEACE OPERATIONS: WHY THE NORTH ATLANTIC TREATY SHOULD BE AMENDED

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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APRIL 1998

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MAJOR J.D. GODWIN

ABSTRACT: In this thesis Major Godwin examines the sources of international law which support prosecution of peace operations by regional organizations. The practical reasons for the investigation lie in escalating ethnic and religious conflict while the ability of the United Nations to mediate cease-fires or enforce the peace is decreasing. The original legal basis for regional operations is Chapter VIII of the United Nations Charter. However, customary international law has evolved significantly since the Charter was drafted in 1945, and regional organizations are not strictly bound by the dry words of Chapter VIII.

This thesis describes the history of regional action in peace operations, including the emergence of the so-called humanitarian and democratic intervention doctrines. It also describes how the need for regional "subcontractors" by the UN was met in Bosnia by the concurrent decision of the North Atlantic Treaty Organization (NATO) to participate in such operations on a "case by case basis." This thesis argues that NATO has unnecessarily limited its traditional freedom of action by agreeing to perform peace operations only at the behest of the United Nations, or the Organization for Security and Cooperation in Europe (OSCE). It further argues that the current state of customary international law allows a regional organization, such as NATO, to perform peace operations even without the authorization of the UN Security Council.

After the end of the Cold War, NATO lost its single overarching mission which was opposition to the Soviet empire. It has sought a new mission to justify its existence since that time. Some have come to regard NATO enlargement as a security end in and of itself. The argument is that by expanding into Central and Eastern Europe, NATO has widened the zone of democracy which in turn fosters long term regional stability. However, by expanding, NATO has nudged its borders up against regions such as the Balkans, the Caspian Sea, and Northern Africa where increasing strife threatens to spill-over into the newly defined North Atlantic region. The new democracies are still fragile and without historical precedent. This thesis argues that NATO will be increasingly forced to intervene in areas outside the traditional scope of the North Atlantic region, and in situations which cannot be easily characterized as "collective self-defense."

This thesis proposes amendments to the fifty year-old North Atlantic Treaty. The proposed amendments will permit NATO to perform peace operations under its own Charter, without borrowing its legitimacy from other international organizations. They will also commit the Alliance to a new vision of humanitarian and democratic intervention which will ensure its continued vitality into the foreseeable future.

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NATO'S ROLE IN PEACE OPERATIONS: WHY THE NORTH ATLANTIC TREATY SHOULD BE AMENDED

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I. Introduction

The North Atlantic Treaty¹ contains no provisions allowing its members to participate in peace operations² under Chapter VIII of the United Nations Charter.³ Nevertheless, in

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¹ North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter North Atlantic Treaty].

² The term "peace operations" needs to be defined up front because scholars, diplomats, and military planners tend to expand or contract the concept to fit their own conceptual framework. For purposes of this thesis the term is to be given the comprehensive scope contained in DEPARTMENT OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 2 (Dec 1994) [hereinafter FM 100-23]. The manual definition of peace operations includes support to diplomacy, peacekeeping, and peace enforcement.

³ U.N. CHARTER arts. 52-54. Chapter VIII states:
Article 52:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
4. This Article in no way impairs the application of Articles 34 and 35.

1993 the North Atlantic Treaty Organization (NATO) began flying missions above Bosnia⁴ to protect UN peacekeeping forces and to monitor the so-called safe havens declared by the Security Council.⁵ At the same time, NATO naval forces were the primary component enforcing the UN arms embargo imposed on the warring factions within the Federal Republic of Yugoslavia (FRY).⁶ By December 1995, mediators negotiated an unlikely cease-fire and

Article 53:

1. The Security council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action Under its authority. But no enforcement action shall be taken Under regional arrangements or by regional agencies without the authorization of the Security council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.
2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54:

The Security council shall at all times be kept fully informed of activities Undertaken or in contemplation Under regional arrangements or by regional agencies for the maintenance of international peace and security.

⁴ *NATO's Role in Bringing Peace to the Former Yugoslavia*, NATO BASIC FACTSHEET NO. 4 (last modified Mar. 1997) <<http://www.nato.int/docu/facts/bpfy.htm>> [hereinafter NATO FACTSHEET NO. 4]. Flying in support of the UN NATO fired its first ever shot in anger shooting down four aircraft violating the no fly zone declared by the Security Council. *Id.* at 3.

⁵ S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993). After repeated cease-fire violations by both sides, but in particular the Bosnian Serbs, the Security Council attempted to create safe areas in and around major cities, which were to be off-limits to attack. When the sanctity of these areas was not honored, the Security Council, in what was a radical departure from their time-honored philosophy of peacekeeping, authorized use of force to protect the safe havens. *See* S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

⁶ Steven R. Rader, *NATO, in CHALLENGES FOR THE NEW PEACEKEEPERS* 142 (Trevor Findlay, ed., 1996). NATO began monitoring compliance with UN sanctions against the factions of the Federal Republic of Yugoslavia (FRY) in July 1992 in conjunction with a provisional Western European Union (WEU) naval task force in the Adriatic. In November 1992, NATO and the WEU decided enforce the embargo. The two organizations merged into a single chain of command, essentially the NATO military structure, in June 1993 (Operation Sharp Guard). *Id.* at 146. Between 22 November 1992 and 18 June 1996, Operation Sharp Guard forces challenged over 74,000 merchant vessels, boarded and inspected nearly 6,000 of those vessels, and spent almost 20,000 ship days at sea. *See Operation Sharp Guard*, ALLIED FORCES SOUTHERN EUROPE FACT SHEET (visited Mar. 18, 1998) <<http://www.fas.org/man/dod-101/docs/SharpGuardFactSheet.htm>>.

an unprecedented agreement to hand off UN peacekeeping duties to a multinational force (MNF) under NATO's command and control.⁷

The Bosnia mission is the first of its kind by NATO. However, it is unlikely to be its last. The end of the Cold War significantly reduced the chances of super-power confrontation. Lower nuclear tension masks increasing regional violence, often grounded in historical ethnic, cultural, and religious differences.⁸ Bosnia is a prime example, but there are many others simmering within Europe and on its periphery. An incomplete list of recent examples includes near civil war in Albania,⁹ continuing friction between Greece and

⁷ General Framework Agreement for Peace in Bosnia and Herzegovina-Croatia, Yugoslavia, December 14, 1995, 35 I.L.M. 75 (1996)[hereinafter GFAP]. The pertinent military aspects are contained in Annex I-A. The GFAP "invited" the United Nations Security Council to adopt a resolution authorizing a MNF with the understanding that all forces, NATO and non-NATO, would operate "under the authority and subject to the direction and political control of the North Atlantic Council ... through the NATO chain of command." The UN quickly accepted the invitation. See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995). Acting under Chapter VII, the Security Council directed the parties to cooperate with the multinational force. It "welcomes the willingness of the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to assist the parties to the Peace Agreement by deploying a multinational implementation force." *Id.* para. 12. It then authorized the implementation force (IFOR) "under unified command and control in order to fulfill the role specified in Annex 1-A and Annex 2 of the Peace Agreement." *Id.* para. 14. IFOR (NATO) was further authorized to "take all necessary measures" including enforcement actions. *Id.* para. 15. The UN acknowledged this arrangement was as had been agreed in the GFAP. *Id.* paras. 15 and 17.

⁸ See, e.g., Ralph Peters, *After the Revolution*, PARAMETERS, Summer 1995, at 7; Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44; ALVIN & HEIDI TOFFLER, WAR AND ANTI-WAR: SURVIVAL AT THE DAWN OF THE 21ST CENTURY (1995); Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22.

⁹ *No Plans for WEU Intervention in Albania: Bonn*, XINHUA ENGLISH NEWSWIRE, Mar. 14, 1997, available in 1997 WL 3750650. A pyramid scheme collapsed leading to riots across Albania. The government requested peacekeeping troops from both WEU and NATO, but the request was rejected. See Kevin Done, *Albania Declares State of Emergency Over Riots*, FIN. TIMES, Mar. 3, 1997, available in 1997 WL 3777226 (quoting President Berisha that conditions threatened "to engulf Albania in a civil war"). By July 1997 a semblance of order returned to Albania allowing special elections. Western countries reportedly are keeping an eye on the situation for fear further unrest would spark more refugees. See *A New Government Awaits Albania*, STAR-TRIB. (Minneapolis-St. Paul), July 1, 1997, at A7.

Turkey,¹⁰ and religious and political violence in Algeria.¹¹ Meanwhile, the UN is spread thin attending to disturbances around the globe.¹²

For a variety of reasons, the UN will not be able to keep pace with the growing cycle of violence. Political disagreements have disrupted the Security Council almost from the beginning. "Peacekeeping was discovered like penicillin [by accident],"¹³ because super-power competition during the Cold War blocked the Security Council from effectively

¹⁰ The two NATO countries nearly went to war in January 1996 over an uninhabited 10-acre islet in the Aegean Sea after journalists from both sides planted flags there. In 1987, they nearly fought over mineral rights in the Aegean. They did fight in 1974 when Turkey invaded Cyprus to support Turkish Cypriots against Greece. Patrick Quinn, *War For a Pile of Rocks? Greece, Turkey Rattle Sabers*, N. N.J. RECORD, Jan. 31, 1996, at A9. Due to these and other disputes over territorial waters, airspace, and islands, the two countries continued arms build-up while most of Europe has downsized. Mike Theodoulou, *Saving Greece and Turkey from War Keeps U.S. Busy*, CHRISTIAN SCI. MONITOR, Feb. 8, 1996, at 7. Tensions again increased recently after Turkey was excluded from the European Union. The Turks were also insulted when the EU decided to open talks with Cyprus instead. See, e.g., *Face-off in Aegean*, PITTSBURGH POST-GAZETTE, Jan. 3, 1998, at A4 (reporting challenges between Turkish and Greece naval vessels in the Aegean).

¹¹ Geneive Abdo, *Militant's Threaten Algeria Regime's Grip*, DAL. MORN. NEWS, Oct. 30, 1994, at A1. When Islamic fundamentalists won majorities in local elections in 1991, a joint military-civilian junta canceled the next year's national elections and outlawed the main Islamic party, the Islamic Salvation Front (FIS). The FIS spawned several groups which try to intimidate the government by using terrorist methods. The government reputedly responds in kind. By 1994 the official death toll was about ten thousand. Unofficial sources estimated thirty thousand deaths. For further information on the background to the Algerian Civil War, see *Algeria: Background to a Civil War*, JANE'S DEF. WKLY., Dec. 1, 1994, at 3. The cycle of violence continues to grow. A 1998 report set the death toll at 75,000. The violence on Europe's doorstep, coupled with the fear that terrorism will spread across the Mediterranean into Europe along with Algerian refugees prompted a recent visit by an European Union fact-finding mission. See Charles Trueheart, *European Mission to Algeria Cites Mixed Success*, WASH. POST, Jan. 21, 1998, at A17.

¹² *Supplement to an Agenda For Peace: Position Paper Of Secretary Boutros-Ghali On The Occasion Of The Fiftieth Anniversary Of The United Nations*, U.N. GAOR, 50th Sess., U.N. Doc. A/50/60 (1995), U.N. Sales No. E.95.I.15 (1995)[hereinafter *Supplement to an Agenda For Peace*]. The Secretary-General provided eye-opening statistics in his report showing that the number of peace operations conducted under UN authority grew from five in January 1988 to seventeen in December 1994. During the same period the number of troops deployed increased from less than 10,000 to almost 74,000.

¹³ Sir Brian Urquhart, former UN Under-Secretary General with peacekeeping responsibilities, quoted in Alan K. Henrikson, *The United Nations and Regional Organizations: "King-Links" of a "Global Chain,"* 7 DUKE J. COMP. & INT'L L. 35, 46 (1996).

performing its intended peace-enforcement role.¹⁴ Many heralded the end of the Cold War as the renaissance of collective security. These predictions have proven to be unfounded. For example, Security Council members have been at loggerheads over measures against Iraq off and on since the end of the Gulf War. Their political differences often encourage Saddam Hussein to defy the UN.¹⁵

Financial and technical shortcomings also limit the UN's ability to respond effectively. While its peacekeeping activities expanded, the UN's peacekeeping budget increased almost fifteen times.¹⁶ The Secretary General sharply criticized the member states in his Supplement to An Agenda for Peace, released in early 1995, for their failure to provide funding for UN peace operations. He warned that many operations could not be pursued or,

¹⁴ *Id.*

¹⁵ Robert H. Reid, *U.S. Fails to Persuade Russia to Back Wider Iraq Sanctions*, SUN-SENT. (Ft. Lauderdale, FL), Oct. 22, 1997, at A18. In October 1997 Russia blocked initiatives backed by the U.S. and the United Kingdom to impose new sanctions on Iraq. Along with France, Russia reportedly has agreements with Iraq which will enable it to profit on newly released oil when the sanctions are lifted. Apparently emboldened by the discord, Saddam Hussein's government moved to have the sanctions lifted entirely. Later, Iraq blocked UN weapons inspectors from sites around the country. It demanded a change in the composition of the team and pushed to have the sanctions lifted. Russia stepped in to negotiate. After it promised to support Iraqi demands, Saddam Hussein allowed the monitors back into Iraq. Although China backed the Russian initiative, none of the other Security Council members did. See Anne Penketh, *U.N. Security Council Meets after Russia Fails on Iraq Agenda*, AGENCE FRANCE-PRESSE, Nov. 22, 1997, available in 1997 WL 13439725. However, it quickly became apparent Iraq intended to bar the inspectors from important sites. The U.S. and Britain began to lobby for the right to use force to compel Iraq to permit the inspectors to do their job. Russia, initially supported by France, insisted force was not an option. See Anne Swardson, *France, Russia Urge Diplomacy in Iraqi Impasse*, WASH. POST, Jan. 29, 1998, at A23. Although France later indicated it might support use of force under some conditions, the likelihood that Russia and China would veto any action by the Security Council left the U.S. hinting it might take unilateral action. See Barton Gellman, *Paris Lends Support to U.S. on Iraq*, WASH. POST, Jan. 30, 1998, at A1.

¹⁶ See *Supplement to an Agenda For Peace*, *supra* note 12, para. 11. The budget grew from 230 million dollars in 1988 to 3.6 billion dollars in 1994. *Id.*

if pursued, could not be performed "to the standard expected."¹⁷ Nevertheless, some major contributors, including the United States, continually refuse to pay their assessments.¹⁸

Command and control of forces engaged in UN peace operations is a continual source of friction between the Security Council and the troop contributing nations. The Secretary General contends operational and strategic control of the forces belongs to the UN alone.¹⁹ This position is unacceptable to many nations, especially the United States.²⁰

In order to survive these systemic problems, the UN has increasingly turned to regional organizations for help. This is a marked evolution for the United Nations. The drafters of the UN Charter very nearly did not recognize the rights of regional organizations. Chapter VIII and the self-defense measures of article 51 were included only after the Latin American states insisted and were joined by European members who feared a re-emergent

¹⁷ See *id.* para. 97 ("The failure of Member States to pay their assessed contributions for activities they themselves have voted into being makes it impossible to carry out those activities to the standard expected. It also calls in question the credibility of those who have willed the ends but not the means - and who then criticize the United Nations for its failures.").

¹⁸ By late 1996, the UN reported over \$700 million in outstanding contributions. *U.N. Secretariat, Status of Contributions as at 30 September 1996*, at 9, U.N. Doc. ST/ADM/SER.B/499 (1996). The U.S. portion continues to rise. In 1997, U.S. domestic political in-fighting led the Congress to delete funds which had been intended to help pay for U.S. delinquent dues. The UN could be bankrupt by the end of 1998. Of delinquencies, the U.S. owes about 61%. John M. Goshko, *U.S. Refusal to Pay Debt Alarms U.N.*, WASH. POST, Nov. 15, 1997, at A1.

¹⁹ See *Supplement to an Agenda For Peace*, *supra* note 12, paras. 38-42. The Secretary General identifies three fields where he admits the UN system is lacking: (1) command and control; (2) troop availability; and (3) communications problems. As to command and control, he argues strongly that the troop-supplying nations have to butt out; that he will consult and dialogue with the Security Council and member nations so that all are informed of the current status of deployments.

²⁰ See *infra* note 94 and accompanying text for a discussion of the Constitutional and practical issues associated with command and control.

Germany.²¹ After the Charter's ratification, the role of regional organizations was ill-defined and often distrusted, as in the Organization of American States' (OAS) intervention in the Dominican Republic.²² However, recent developments in Liberia, Bosnia, and Haiti reflect the trend toward cooperation between the UN and regional organizations.²³

The political and military importance of NATO makes it an attractive partner to the UN. The UN's move toward regional cooperation has met NATO's willingness to take on a role in peace operations. This is a new development for NATO as well. For almost five decades, NATO members insisted the Alliance was not a Chapter VIII regional organization. Instead, the members carefully tied NATO's mission to collective self-defense.²⁴ The North

²¹ U.N. CHARTER art. 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." See generally Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 DUKE J. COMP. & INT'L L. 3, 5-18 (1996) (providing detailed background of the Dumbarton Oaks and San Francisco Conferences which led to the ratification of the UN Treaty).

²² LINDA B. MILLER, *WORLD ORDER AND LOCAL DISORDER* 159 (1967). Many within the UN saw this as a power grab by the U.S. and called for UN involvement. The U.S. contended no UN involvement or approval was required because this was not an "enforcement action" under Article 52. The U.S. also argued that UN involvement would result in "two international organizations doing the same thing in the same place at the same time." The UN proved especially wary whenever one of the Cold War powers was involved. For example, the same concerns were reflected in the Dominican Republic when the U.S. invaded Grenada after the Organization of Eastern Caribbean States (OECS) invited intervention. See John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 153 (1984) (On November 2, 1983 "the UN General Assembly voted, by a larger majority than in the condemnation of the Soviet invasion of Afghanistan, to condemn the mission as a 'violation of international law'").

²³ See *infra* notes 155 to 263 and accompanying text.

²⁴ The North Atlantic Treaty, *supra* note 1, art. 5 states in part: "The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it

Atlantic Council's (NAC) motivation for limiting their agreement was partially driven by the fear that operating under Chapter VIII would give the UN Security Council an opportunity to meddle in the alliance's affairs.²⁵ The NAC particularly wanted to avoid the possibility of a Soviet veto over NATO initiatives.

Ironically, the abrupt collapse of the Soviet Union left NATO without that overarching mission. NATO tried to justify its continued viability in the face of arguments that other European mechanisms were more appropriate.²⁶ Rather than agreeing to disband, NATO took the initiative and declared in 1992 that it was willing to support peace operations conceived by the Conference on Security and Cooperation in Europe (CSCE)²⁷ on a case-by-case basis.²⁸ The following year, NATO extended the same pledge to the UN.²⁹ The

deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

²⁵ See, e.g., Jane A. Meyer, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, 11 B.U. INT'L L.J. 391, 423-4 (1993). See also Jane E. Stromseth, *The North Atlantic Treaty and European Security after the Cold War*, 24 CORNELL INT'L L.J. 479, 482 (1991) (detailing these historical reasons for distinguishing NATO from a Chapter VIII regional organization); Christopher J. Borgen, *The Theory and Practice of Regional Organization Intervention in Civil Wars*, 26 N.Y.U. J. INT'L L. & POL. 797 (1994) (asserting the purpose was to intentionally avoid oversight by the UN).

²⁶ James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 27, 60-61 (Lori Fisler Damrosch ed., 1993). For example, France has been particularly insistent that Europe should conduct most military operations through the Western European Union (WEU). *Id.*

²⁷ Now the Organization for Security and Cooperation in Europe (OSCE).

²⁸ See Rader, *supra* note 6, at 143. This was the so-called "Oslo Declaration" of 1992. Interestingly, this initiative received almost no attention in the strategic concept document released less than a year prior. The communiqué released after the Rome conference in 1991 reflected the alliance's traditional emphasis on collective self-defense. See NATO Communiqué, *The Alliance's New Strategic Concept* (last modified Nov. 8, 1991) <<http://www.nato.int/docu/comm/c911107a.htm>> [hereinafter *The Alliance's New Strategic Concept*].

²⁹ See Rader, *supra* note 6, at 143.

Partnership for Peace (PFP) initiative³⁰ and the concept of NATO expansion occurred at substantially the same time.

These ambitions are aptly characterized as a full employment guarantee for NATO. Events in Bosnia quickly demonstrated that the existing European security structure was incapable of handling the crisis without the presence of U.S. armed forces.³¹ NATO moved to fill the gap. The future addition of Hungary, the Czech Republic, and Poland to the alliance, with probably others to follow, will risk NATO involvement in the traditional ethnic or religious conflicts and border disputes which have characterized the region. The same is true concerning the PFP initiative.³² Events such as the situation in Iraq and the continuing

³⁰ The PFP movement had its origins in the liberation of Central Europe. NATO invited the Central Europeans to "dialogue" on security and related issues. The North Atlantic Cooperative Council grew out of these efforts. Following the dissolution of the Soviet Union, the NACC members swiftly grew. The original NACC structure proved inadequate to the members' needs. Additionally, the Central Europeans felt their interests were inappropriately lumped with the former Soviet members and sought entry into NATO. As a compromise, NATO offered the PFP alternative in December 1994 as a mechanism for security cooperation and possible expansion. Jeffrey Simon, *The PFP Path and Civil-Military Relations*, in NATO ENLARGEMENT: OPINIONS AND OPTIONS 49-52 (Jeffrey Simon ed., 1995).

³¹ See Steinberg, *supra* note 26, at 38 (detailing the European Union's inability to broker a durable cease-fire, or construct a viable WEU peacekeeping force). In the early part of the Bosnian conflict France insisted on broad European conduct under WEU. This resulted in confusing command relationships in the Adriatic where both NATO and WEU sought to enforce the embargo. Many of France's WEU partners became reluctant to act without the United States. *Id.* at 60-61.

³² Christopher Burns, *European "Roundtables" to Hear Rights Disputes*, PHOENIX GAZETTE, May 28, 1994, at A10. The European Union has recognized ethnic tensions would burden many of the Eastern European nations seeking to join the EU. Of prime concern are the large Hungarian minorities present in the Czech Republic and also to a greater extent within Romania. Russian minorities in the Baltic countries also could be a problem. Poland seeks guarantees for the rights of Poles in the Ukraine, and Germans are a prominent ethnic group within the Czech Republic. Recognizing that it will face the same problems when selecting candidates for expansion, and wary of admitting problems similar to the Turkey/Greece dispute, NATO has encouraged these nations to sign "friendship" treaties in hopes these will keep disputes from spinning out of control. The Hungarians have concluded agreements with both the Romanians and the Slovakian Republic with uncertain prospects for success. See Tom Hundley, *Hungary Taking the High Road in Bid to Join NATO*, CHICAGO TRIB., Apr. 6, 1997, at 6.

strife within the countries of the former Soviet Union may warrant NATO intervention as well.³³ Competition for Caspian Sea oil will add fuel to the flames of war.³⁴

In order to meet these challenges, the alliance's vision must be as clear today as it was when the partnership was formed. The North Atlantic Treaty is almost fifty years old. It was designed to enable Western Europe to withstand the onslaught of the Soviet Union. That threat is gone, at least for the immediate future. There has been a fundamental shift in world order, and the present treaty is not structured to deal with the new demands placed on the alliance. Threats along NATO's expanding periphery indicate that the alliance must prepare to support fledgling democracies and to perform humanitarian missions in a broader area to thwart the spill-over of violence into its own region. This thesis argues that the members of the North Atlantic Treaty must amend the treaty to allow NATO to perform peace operations beyond collective self-defense in the North Atlantic area.

³³ See *Caucasus Region Torn By Independence Struggles*, ASSOCIATED PRESS, Oct. 20, 1997, available in 1997 WL 4888688 (cataloging persistent fighting across the former Soviet republics, including Nagorno-Karabakh featuring Armenian versus Azerbaijani; Chechnya pitting predominantly Muslim groups against Russia; and, rebellions in Abkhazia and South Ossetia, breakaway provinces of Georgia). Tensions heightened between Armenia and Azerbaijan recently when the moderate president stepped aside after a rift developed between his party and hard-liners. The president had called for negotiations over Nagorno-Karabakh, but members of his own party would not back him. The new president was the leader of Nagorno-Karabakh during its six year war against Azerbaijan. Hasmik Mkrtchyan, *Backers of Ex-Armenian Leader Quit*, WASH. POST, Feb. 5, 1998, at A21.

³⁴ See Gerald Utting, *Ethnic Horrors Fuel New "Great Game,"* TORONTO STAR, Mar. 14, 1992. Three regional powers, Russia, Turkey, and Iran have struggled for control of the Caspian Sea area for centuries. Each has an ethnic card to play justifying its interest in the area. Meanwhile, Western interests recently concluded oil deals with Azerbaijan. The huge petroleum reserves can only be exported via pipeline. Current plans call for the main line to exit Azerbaijan then cross Georgia and Turkey to the port of Ceyhan. Russia and Iran are unhappy about the proposal and have recently strengthened ties with Armenia -- Azerbaijan's nemesis. Phil Reeves, *Black Gold: West Lays Its Bets As the Caspian's Oil Bonanza Begins*, THE INDEPENDENT (London), Nov. 13, 1997, at 17.

As noted above, NATO is already performing peace operations. Some may question the utility of changing the treaty to reflect what is already a *fait accompli*. However, the change is essential to define the legal basis for future alliance action. The treaty defines both the rights and obligations of its members. Without a textual basis, NATO does not have a defined legal right to conduct peace operations. Conversely, NATO members have no affirmative obligation to participate in operations beyond the clear text of the treaty. The amendments that this thesis proposes will provide the legal foundation for NATO action which is currently lacking.³⁵

The amendments will also clarify the position of NATO members concerning out of area conflicts. The present treaty permits military action only within the North Atlantic region and only for collective self-defense.³⁶ In all other instances, members are bound only to "consult" when an individual member's interests are threatened.³⁷ Most of the conflicts that NATO will be called upon to resolve originate in areas immediately adjacent to, but not within, the North Atlantic region. In order to maintain the advantages that derive from using the NATO structure, such as command and control, interoperability, and standardized

³⁵ This hypothesis is supported by recent events. One need look no further than the firestorm of controversy surrounding the Grenada invasion to find arguments that the invasion was illegal because, among other reasons, the Charter of the Organization of Eastern Caribbean States (OECS) did not permit the action. The Grenada incident is discussed *infra* at notes 176 to 191 and accompanying text. The legality of intervention by the Economic Community of West African States (ECOWAS) in Liberia is also in dispute despite the implied authority granted to that action by the Security Council. See *infra* notes 193 to 215 and accompanying text.

³⁶ North Atlantic Treaty, *supra* note 1, art 5.

³⁷ *Id.* art. 4. ("The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.")

procedures, the members must be prepared to act outside the strict regional parameters written into the treaty.

It is not at all clear that NATO members are currently prepared to act "out of area." For example, despite the recent pronouncements of the German government, it is uncertain when that nation will permit its armed forces to participate in NATO operations other than collective self-defense. At least in the early stages of the Bosnia conflict, Germany did not permit its ground troops to aid the UN Protection Force in Bosnia-Herzegovina (UNPROFOR).³⁸ The German government also refuses to participate in countries where there is lingering hostility towards Germany due to occupation during the Second World War.³⁹ Similarly, France has been reluctant to participate in the European Union fact-finding efforts in Algeria due to its own historical involvement in that country.⁴⁰ Others, for political or practical reasons, may also be reluctant to commit out of area without prompting by treaty obligations.

This thesis also advocates amending the North Atlantic Treaty to permit humanitarian intervention and intervention on behalf of democratic governments. Critics argue that these are not internationally accepted authorities for use of force. However, just as peacekeeping

³⁸ UNPROFOR was the multinational force that preceded NATO intervention in Bosnia. Further details are provided *supra* notes 237 to 263 and the accompanying text.

³⁹ Hans Georg Ehrhart, *Germany*, in CHALLENGES FOR THE NEW PEACEKEEPERS 32, 40 (Trevor Findlay, ed., 1996).

⁴⁰ See Charles Trueheart, *European Mission to Algeria Cites Mixed Success*, WASH. POST, Jan. 21, 1998, at A17. France is criticized by the Algerian government for any comments it makes about the situation, while suffering terrorist bomb attacks from the Algerian opposition. *Id.*

evolved from Chapter VI without a textual basis, as Chapter VIII becomes energized, regional organizations will undertake peace operations in which the parameters are not discernible from the dry words of the UN Charter.

These proposals are in accord with the current practice of nations.⁴¹ They should be recognized as legitimate aims of NATO. New members joining NATO understand that they are bound to maintain a democratic form of government, that their militaries submit to civilian control, and that they will settle long-standing ethnic and border disputes.⁴² The treaty should reflect the Alliance's right to intervene in the event a member government's collapse leads to a humanitarian disaster. Likewise, the organization should have the ability to intervene on behalf of a member democratic government that has been overthrown by unconstitutional means. Reaffirming these basic values should be the price of admission to the alliance.

⁴¹ The UN Security Council authorized "all necessary means" to restore the Aristide government in Haiti, specifically finding a "threat to security and peace in the region" in a situation traditionally recognized as an internal affair. See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 4, U.N. Doc. S/RES/940 (1994). According to one commentator, the Security Council took great pains to emphasize the "unique" nature of the situation in Haiti hoping to avoid establishing the unique as the norm. However, the same commentator acknowledges the difficulty of unmaking precedent. See Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and Rise of Federalism Under the United Nations Charter*, 31 TEX. INT'L L.J. 353, 430-432 (1996). Likewise, the Security Council praised the ECOWAS humanitarian intervention in Liberia even though it did so in the midst of an internal struggle. See S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992) (finding the deteriorating situation in Liberia "constitutes a threat to international peace and security, particularly in West Africa as a whole" and commending ECOWAS for its efforts).

⁴² BUREAU OF EUROPEAN-CANADIAN AFFAIRS, U.S. DEPT. OF STATE, *Minimum Requirements for Nato Membership* (last modified Aug. 15, 1997) <http://www.state.gov/www/regions/eur/fs_970815members.html>.

So that one reluctant country may not block an action considered vital to the organization as a whole, several factors suggest that NATO members should change their consensus method of decision-making. First, because this thesis recommends that the alliance amend the treaty to allow intervention to assist democratic governments that have been forcibly removed and to permit humanitarian operations, consensus among NAC members may be impossible. Second, consensus will be more difficult to achieve as NATO membership grows. Finally, although Russia may not have, as some claim,⁴³ a veto on the North Atlantic Council (NAC), it is certain to exercise a strong voice through the NATO-Russia Permanent Joint Council.⁴⁴ The Russian opinion is sure to carry greater weight the closer NATO initiatives encroach on its borders or traditional spheres of influence. A so-called “opt out” provision in combination with “consensus minus one” voting will enable NATO to act.⁴⁵

The suggested amendments offer distinct advantages over two alternatives that are typically advanced to keep peace operations within the sole control of the United Nations. First, maintaining the NATO command and control structure during peace operations avoids

⁴³ See, e.g., George F. Will, Opinion, ...*In a Dangerous World*, WASH. POST, Nov. 27, 1997, at A19 (“An Agreement (the Founding Act) intended to reconcile Russia to NATO expansion can be construed to make NATO actions reviewable by organizations (the United Nations and the Organization for Security and Cooperation in Europe) in which Russia participates.”). But see NORTH ATLANTIC TREATY ORGANIZATION, FOUNDING ACT ON MUTUAL RELATIONS, COOPERATION AND SECURITY BETWEEN NATO AND THE RUSSIAN FEDERATION 5 (visited Jan. 15, 1998) <<http://www.nato.int/docu/basic/txt/fndact-a.htm>> [hereinafter FOUNDING ACT] (declaring the Founding Act grants neither NATO nor Russia the right to veto each others actions or infringe on each other’s decision-making).

⁴⁴ NATO and Russia formed the Permanent Joint Council “to develop common approaches to European security and to political problems.” One of the Permanent Joint Council’s mandates is to act as a consultative forum “in times of crisis or any other situation affecting peace and stability.” See FOUNDING ACT, *supra* note 43, at 4.

⁴⁵ See *infra* notes 345 to 346 and accompanying text.

the inevitable confusion arising from the ad hoc coalitions typically used by the UN. Second, it is a viable alternative to the extinct concept of a universal force formed under Article 43 of the UN Charter.⁴⁶

From the U.S. perspective, the suggested amendments present two further advantages. First, placing responsibility for peace operations in NATO keeps the U.S. firmly engaged in Europe, whereas the U.S. would be excluded if another security structure, such as the West European Union (WEU), took on the duty. Most NATO allies will welcome continued U.S. involvement. As a practical matter, they have demonstrated reluctance to engage in peace operations without U.S. commitment. Additionally, action within NATO is a more politically acceptable alternative to most U.S. lawmakers. Forces devoted to NATO do not face the same personnel and funding limits found in the UN Participation Act.⁴⁷

Part II of this thesis explores why the United Nations is unable to function as the sole guarantor of international peace and security. The focus is on the practical constraints acting on the international organization. Part III discusses the role of regional organizations and their relationship with the UN. Deriving their legal authority from Chapter VIII of the UN

⁴⁶ Article 43 of the UN Charter envisions that the Member States will "make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities" Some have inaccurately described this arrangement as the creation of a UN standing army. Whatever its form, no nation has ever concluded such an agreement, nor is it likely to ever be implemented. *But see* Henrikson, *supra* note 13, at 63-70 (asserting Article 43 is the most effective way the UN can constrain the newly powerful regional organizations).

⁴⁷ 22 U.S.C.A. § 287 (West Supp. 1997) (setting U.S. troop contribution to UN peacekeeping operations at no greater than 1000 men and the funding parameters for the same).

Charter, these regional arrangements have evolved to the point that their importance in maintaining regional peace is nearly as great as that of the United Nations.

Case histories concerning regional action in the Dominican Republic, Grenada, Liberia, and Haiti record the emerging partnership between the UN and regional organizations. Those missions also demonstrate the creation of customary international law favoring regional action, especially in the field of humanitarian relief and democratic intervention.

Part IV narrows the focus on regional organizations to the role of NATO in Bosnia. It examines the factors supplying the impetus for transforming NATO from a west European collective security arrangement to a sponsor of regional peace and security. Part V explains why it is necessary to amend the North Atlantic Treaty so that the alliance may fully assume the responsibilities that will be thrust upon its members due to the ineffectiveness of the United Nations. A clear legal basis promotes unity of purpose and vision for the alliance. The members must commit themselves to their new mission and redefine their operational area. The proposed amendments include a specific role for NATO in democratic and humanitarian intervention. Finally, Part VI specifies the recommended amendments to the North Atlantic Treaty.

II. Why United Nations Peace Operations Need Regional Help

The United Nations faces growing limitations on its ability to conduct peace operations. This part examines the practical shortcomings of the organization which lead it

increasingly to ask for regional help. These problems are caused by both the structure of the Charter and by external influences beyond the UN's control.

One problem built into the structure of the charter is the veto power. The power, controlled by the permanent members of the Security Council, is often blamed for the UN's inconsistent approach to peace operations. Peace operations during the Cold War era were often blocked due to East-West competition.⁴⁸ Article 27 of the charter provided a convenient mechanism for the opponents to thwart resolutions they thought were advantageous to the other side.⁴⁹ This provision allows any one of the five permanent members to obstruct actions supported by the other members of the Security Council. Over the course of forty-five years, the veto power prevented the UN from taking a decisive role in

⁴⁸ See Major General V.A. Zolotarev, *The Cold War: Origins and Lessons*, in INTERNATIONAL COLD WAR MILITARY RECORDS AND HISTORY 11 (William W. Epley ed., 1994) for an interesting view from the Russian perspective on the forces driving the Cold War. General Zolotarev believes, "Looking for a culprit in the 'Cold War' is in our opinion a useless exercise because everything in world politics is inter-connected. Thus, any action of one party, which at first glance provided an incentive for the escalation of hostility, if studied thoroughly, will turn out to be a response to some measure of the opponent. One should be forthright: both opposing parties did not act with pristine motives and this led to increased tensions on a global scale in the post-war period, even though the cooperation reached during World War II created conditions for the coordinated solving of problems." *Id.* at 12. In his view the desire of the Soviet Union to establish pro-Communist regimes in Eastern Europe received impetus from perceived slights when the West attempted to accept German surrender in Italy without Soviet participation and then abruptly halted Lend-Lease activities. By 1947 the Soviet fears were confirmed by Winston Churchill's famous "Iron Curtain" speech and the announcement of the Truman Doctrine which was designed to thwart Soviet aims of establishing a pro-Communist government in Greece. The Soviets viewed the Marshall Plan as an attempt to collapse their buffer zone and blocked its extension into Eastern Europe. To provide a counter to the Marshall Plan, the Soviets then created the Information Bureau of Communist Parties (COMINTERN). This was supported by a system of friendship, cooperation and mutual aid treaties, which General Zolotarev admits were of a decidedly "anti-Western" character. The West reacted by creating the Western European Union in 1948 and the North Atlantic Treaty Organization in 1949. The Warsaw Pact formally came into being in 1955. By then the arms race was in motion, especially in the nuclear field. *Id.* at 12-14.

⁴⁹ U.N. CHARTER art. 27(3) states in pertinent part: "decisions of the Security Council on ... [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."

over 100 major conflicts that resulted in about 20 million deaths.⁵⁰ From 1945 through 1990, the permanent members used the veto 279 times.⁵¹

A rare episode when the veto failed to block UN enforcement action occurred at the beginning of the Korean Conflict.⁵² With Soviet backing, North Korea launched an invasion of its sister state on June 24, 1950. The U.S. immediately called for the Security Council to convene. Fortunately, the Soviet representative was absent.⁵³ The Council voted nine to zero, with one abstention, to condemn the invasion and demanded immediate North Korean withdrawal.⁵⁴ A second resolution, taken before the Soviet representative could hasten back to New York, gave UN members authority to "repel the invasion and restore peace."⁵⁵

The Soviets did not make the mistake of boycotting the Security Council again. Boxed in by the competition, the UN developed peacekeeping as a sort of "Chapter Six and a half" measure⁵⁶ to address situations where East-West interests did not conflict, or where,

⁵⁰ *An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General*, para. 14, U.N. Doc. A/47/277/S/ 24111 (1992) [hereinafter *An Agenda For Peace*].

⁵¹ *Id.*

⁵² BRIAN CROZIER ET AL., *THIS WAR CALLED PEACE* 92, 93 (1984).

⁵³ The Soviets were protesting the presence of the Chinese Nationalists on the Council in lieu of the Communist government. *Id.* at 93.

⁵⁴ S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg., para. 1, U.N. Doc. S/INF/5/Rev.1 (1950).

⁵⁵ S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., para. 5, U.N. Doc. S/INF/5/Rev.1 (1950).

⁵⁶ See Thomas G. Weiss, *New Challenges for UN Military Operations: Implementing an Agenda for Peace*, WASH. Q. 51, 52 (Winter 1993) (crediting Secretary General Dag Hammaskjold with this description of military operations which had no reference in the Charter, but which seemed to bridge the gap between the Chapter VI mandate for pacific settlement of disputes and the Chapter VII enforcement provisions).

often for different reasons, those interests coincided.⁵⁷ For example, in 1960, the new Republic of the Congo appealed to the United States for assistance when its former colonial overlord, Belgium, sent troops there to protect its citizens following a breakdown of law and order in that country. For a variety of reasons, the U.S. was unwilling to devote its time and manpower to the problem. On the other hand, the U.S. feared that the Soviets would intervene, so they referred the Congolese to the UN Security Council.⁵⁸

If the disturbance had been characterized as a purely internal matter, the Security Council may also have declined to get involved if they believed Article 2(7) was a prohibition.⁵⁹ However, the Congo government complained that Belgian troops had violated its nation's sovereignty by entering under the "pretext" of protecting Belgian citizens.⁶⁰ This placed the Security Council in a quandary. The Western powers were anxious to avoid sanctions against Belgium, but feared that invoking Chapter VII would inject Soviet ground

⁵⁷ See Trevor Findlay, *The New Peacekeepers and the New Peacekeeping*, in CHALLENGES FOR THE NEW PEACEKEEPERS 1 (Trevor Findlay, ed., 1996) (tracing the evolution). Findlay states, "Neither mentioned by name nor given a specific legal basis in the UN Charter, peacekeeping evolved pragmatically in response to the limited room for manoeuvre afforded the UN by East-West conflict." *Id.*

⁵⁸ For a detailed background concerning the factions and foreign interests involved, see BRIAN URQUHART, *A LIFE IN PEACE AND WAR* 145-177 (1987).

⁵⁹ U.N. CHARTER art. 2(7) states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ... but this principle shall not prejudice the application of enforcement measures under Chapter VII." *Id.* The accepted reading of Article 2(7) then was that it demanded strict non-intervention. This interpretation has evolved with time, however. See *An Agenda For Peace* *supra* note 50, para. 17 stating, "The time of absolute and exclusive sovereignty ... has passed." See also, *infra* notes 117 to 125 and accompanying text.

⁶⁰ William J. Durch, *The UN Operation in the Congo: 1960-1964*, in THE EVOLUTION OF UN PEACEKEEPING 315 (William J. Durch ed., 1993). The Congo had been a Belgian colony. In the de-colonization movement, Belgium abruptly divested itself of its protectorate in June 1960. Within days the Congo was in chaos. Belgium quickly re-introduced its troops to protect roughly 100,000 of its citizens there. In reality, the peacekeeping action in the Congo involved not only persuading Belgian troops to leave, but to keep the Congolese factions from tearing the country apart. MILLER, *supra* note 22, at 77.

troops into the area. Likewise, the Soviets were eager to ensure that U.S. forces would not intervene. Ultimately, both sides were happy to let the Secretary General handle the situation using peacekeeping procedures.⁶¹ The Security Council empowered the Secretary General to “take steps” to render aid, including military assistance, to the Congo government.⁶²

As tempting as it is to blame the Cold War for Security Council deadlock, the presumption is not entirely accurate. For example, both Britain and France used their veto to block Security Council action during the Suez Crisis, hoping to preserve their political interests in the area despite opposition from their allies.⁶³ Then, after the brief moratorium on

⁶¹ In accordance with guiding principles set by Secretary General Hammarskjöld during the Suez action the Security Council decided that permanent members of the Security Council should not contribute forces to peacekeeping efforts. This principle was still honored when forces were identified for the Congo. UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING* 48, 221 (2d ed., 1990) [hereinafter *THE BLUE HELMETS*]. According to the official UN version of events, the Secretary General felt that it was unnecessary to invoke the enforcement provisions of the Charter because he “assumed that, were the United Nations to act as proposed, the Belgian Government would withdraw its forces from Congolese territory.” *Id.* at 219.

⁶² See S.C. Res. 143, U.N. SCOR, 15th Sess., 873d mtg., U.N. Doc. S/4387 (1960) (including authority “to provide ... such military assistance as may be necessary”). This brief unanimity among the permanent Security Council members would not last. By February 1961 it was apparent the main threat to the Congo was from the Congolese themselves as various provinces attempted to break away. Within what may be referred to loosely as the central government there was internal squabbles and attempted coups. Further attempts to refine the mission moved fitfully after vetoes and threats of veto as one member and then another supported the various factions. MILLER, *supra* note 22, at 77-81.

⁶³ THOMAS M. FRANCK, *NATION AGAINST NATION* 41-45 (1985). Egypt nationalized the Suez Canal in July 1956. Israel attacked the area in October because they claimed feyadeen were raiding from the Sinai. The attack was calculated to draw a response from Egypt. By pre-arrangement with the Israelis, British and French paratroopers then took the canal after warning “both” sides to back off. Their vetoes blocked any action by the Security Council. The British and French proposed using NATO to restore order, but the U.S. insisted the UN was the proper forum. The General Assembly convened in emergency session while Secretary-General Hammarskjöld and Canada’s foreign minister Lester B. Pearson worked out a behind the scenes deal to peacefully intervene using a multinational peacekeeping force (but without troop contributions from the “Big Five”). This United Nations Emergency Force (UNEF) was the first true peacekeeping force providing the model followed by the UN for decades thereafter. A former UN official gives most of the credit for the idea to Secretary General Hammarskjöld for creating a “conceptual masterpiece in a completely new field, the blueprint for a non-violent, international military operation” in response to the abortive raid. URQUHART, *supra* note 58, at 133. It is an interesting piece of trivia that the UNEF was equipped with U.S. surplus World War II

vetoed noted in *An Agenda for Peace*,⁶⁴ it has reappeared in the post-Cold War Security Council as members continue to protect their own political interests.⁶⁵ This has led some member states to complain that the decisions of the Security Council reflect only the interests of the powerful permanent members, not the organization as a whole. Many have lobbied for either an expanded Council and/or limitation on the veto power.⁶⁶ Despite these initiatives, the veto is likely to continue as an impediment to many future UN peace operations.

There are other practical limits preventing the UN from effectively performing peace operations. The UN frequently does not receive the forces and logistics it needs to respond to threats to peace. Additionally, the world organization is often at political odds with

helmets spray-painted United Nations blue to distinguish them from other forces. The blue helmets are now a fixture of peacekeeping. *Id.* at 134.

⁶⁴ See *An Agenda For Peace*, *supra* note 50.

⁶⁵ A sampling of recent vetoes include: A U.S. veto blocking a resolution condemning Israel's east Jerusalem settlement policy, see *Chance to Effect Change at the UN*, BUS. TIMES (London), Mar. 25, 1997, available in 1997 WL 2966637; a U.S. veto preventing a second term for then Secretary General Boutros-Ghali, see *Top U.N. Post Now Wide Open*, ARIZ. REPUBLIC (Phoenix), Dec. 5, 1996, at A16 (casting the lone dissenting vote on the fifteen member Security Council); a U.S. veto threat following a proposal to remove punitive sanctions against Iraq, see *U.S. Vows Veto on Iraq*, PITTSBURGH POST-GAZETTE, Aug. 3, 1995, at A9; a U.S. veto over a resolution demanding Israel stop its settlements in East Jerusalem, *Indonesia Disappointed Over U.S. Veto on Security Council*, KYODO NEWS INT'L, May 22, 1995, available in 1995 WL 2225306; and a Russian veto to apportion the cost of peacekeeping efforts in Cyprus to all UN members, *Russia Uses Veto on Security Council to Kill Cyprus Plan*, ORANGE COUNTY REG. (CA), May 12, 1993, at A14 (citing the lone dissenting vote on the Council). Recently, the Russians insisted the U.S. needed further authorization from the Security Council before launching an attack against Iraq to compel that country to comply with U.N. sanctions imposed following the Gulf War. Russia hinted that it would then veto the proposed action. Daniel Williams, *Yeltsin Says Bombing Iraq Might Bring 'World War,'* WASH. POST, Feb. 5, 1998, at A21. Russia initially blocked a proposed arms embargo against Serbia following the latest unrest in the Kosovo region. William Drozdiak, *West Vows New Sanctions on Yugoslavia*, WASH. POST, Mar. 26, 1998, at A26. The arms embargo was approved only after Russia forced the other members to delete a paragraph calling the Kosovan situation a threat to international peace and security. John M. Goshko, *Arms Embargo on Yugoslavia*, WASH. POST, Apr. 1, 1998, at A24.

⁶⁶ INTERNATIONAL TASK FORCE ON THE ENFORCEMENT OF U.N. SECURITY COUNCIL RESOLUTIONS, UNITED NATIONS ASS'N OF THE UNITED STATES OF AMERICA, WORDS TO DEEDS: STRENGTHENING THE U.N.'S ENFORCEMENT CAPABILITIES 34 (1997) [hereinafter WORDS TO DEEDS].

important members, particularly the United States, and it suffers financial reverses as a result of these disagreements. Finally, the UN has not developed the necessary command, control, and logistics framework necessary to direct large scale interventions.

A. Article 43: Gone But Not Forgotten

While the liberal use of the Security Council veto mirrors the members' distrust of each others' political agendas, their refusal to establish a permanent on-call force for UN peace operations reflects distrust of the world organization itself. Article 43 is the legal authority for such a force.⁶⁷ The article came closest to implementation right after World War II when the Security Council produced a draft of general principles to guide negotiation of Article 43 agreements.⁶⁸ However, the draft was never approved. Although there were several reasons given for this failure,⁶⁹ the original motivation was probably political disagreement founded in Cold War distrust.⁷⁰

Just as the Cold War did not cause all of the Security Council vetoes, it also was not the sole barrier to the implementation of Article 43. In a burst of enthusiasm, the Secretary General greeted the conclusion of the Cold War by stating, "the improvement of relations

⁶⁷ See *supra*, note 46 and accompanying text.

⁶⁸ *General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the United Nations*, U.N. Doc. S/336 (1947).

⁶⁹ U.N. SCOR, 2d Sess., 139th mtg. (1947) indicates that the main points of contention were over numbers and types of military support to be given by the permanent members and the logistics required to base, supply, deploy, and redeploy the troops. *Id.* at 956-975.

⁷⁰ See, e.g., Henrikson, *supra* note 13, at 63; James E. Rossman, *Article 43: Arming the United Nations Security Council*, 27 N.Y.U. J. INT'L L. & POL. 227, 231-233 (1994); Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L.J. 773, 775 (1993).

between States east and west affords new possibilities, some already realized, to meet successfully threats to common security.”⁷¹ He judged that the time was right to ask UN members to negotiate Article 43 agreements “essential to the credibility of the United Nations as guarantor of international security.”⁷²

The response to the Secretary General’s plea was underwhelming. No state has negotiated an Article 43 agreement.⁷³ The United States flatly rejected the proposition,⁷⁴ as did China.⁷⁵ Political reality quickly set in. When the Secretary General supplemented *An Agenda for Peace*, without directly addressing Article 43, he conceded that the United Nations did not have the “capacity to deploy, direct, command, and control operations” for the purpose of peace enforcement. He also stated that “it would be folly to attempt to do so at the present time when the organization is resource starved and hard pressed to handle the less demanding peacemaking and peacekeeping responsibilities entrusted to it.”⁷⁶

⁷¹ See *An Agenda For Peace*, *supra* note 50, para. 8.

⁷² *Id.* para. 43.

⁷³ But see *infra* notes 82-94 (discussing the recent formation of the U.N. Stand-by Forces High Readiness Brigade [SHIRBRIG]). The SHIRBRIG countries have not signed Article 43 agreements, although their pledges support the principles of Article 43.

⁷⁴ BUREAU OF INT’L ORG. AFFAIRS, U.S. DEPT. OF STATE, PUB. 10161, PRESIDENTIAL DECISION DIRECTIVE (PDD) 25: THE CLINTON ADMINISTRATION’S POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS, reprinted in 33 I.L.M. 795, 802 (1994) [hereinafter PDD 25] (“The U.S. does not support a standing U.N. army, nor will we earmark specific U.S. military units for participation in U.N. operations.”).

⁷⁵ Paul Lewis, *U.N. Set to Debate Peacemaking Role*, N.Y. TIMES, Sept. 6, 1992, at A7.

⁷⁶ See *Supplement to an Agenda For Peace*, *supra* note 12, para. 77.

The modern reasons given for failing to implement Article 43 are wide-ranging.⁷⁷ For instance, there are several political rationales advanced against creating a UN army. First, nations resist participating in actions in areas where they have no defined strategic interests.⁷⁸ Second, smaller states and those without a permanent seat on the Security Council fear that they will be the object of UN intervention, whereas the permanent members could block intrusions into their sovereignty through the use of the veto power.⁷⁹ The third reason is the likelihood that the permanent members would be unable to agree on a politically acceptable and competent military commander.⁸⁰ Finally, a deadlocked Security Council may block any action to prevent or to stop aggression.⁸¹

The outline of a scaled-down Article 43 can be seen in the recent establishment of the Planning Element for the UN Stand-by High Readiness Brigade (SHIRBRIG).⁸² Although France suggested a UN rapid reaction force in 1992, the idea never got past the talking

⁷⁷ On the technical level, the drawbacks reported in 1947 remain valid today: Under what circumstances would a member be permitted to withdraw forces dedicated to the UN? If granted the right to withdraw, could the forces be pulled while the UN was actually engaged in combat? How would the UN determine the nationality of the commanders? How are troop contribution obligations determined? What form would UN basing rights take? And, would the UN establish time limits for withdrawal after termination of hostilities? See Miller, *supra* note 70, at 800-805. Modern concerns added to this litany include: Who has command and control of the forces? How would the UN army be trained to ensure uniform tactics and doctrine? How would the UN ensure interoperability among forces with different languages and equipment? See Rossman, *supra* note 70, at 245-247.

⁷⁸ See Rossman, *supra* note 70, at 245.

⁷⁹ *Id.* at 246.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Secretary-General Says Initiative is Milestone in Efforts to Enhance UN machinery for Peace*, M2 PRESSWIRE, Sept. 4, 1997, available in 1997 WL 13654073.

stage.⁸³ The Secretary General repeated the call for a rapid reaction force in 1995.⁸⁴ UN members discussed several ideas, but seven countries, led by Denmark,⁸⁵ took the first affirmative step in December 1996 when they agreed to form SHIRBRIG with a command headquarters near Copenhagen, Denmark.⁸⁶

Despite its designation as a "UN" force, however, SHIRBRIG is simply a multilateral agreement to which the United Nations is not a party.⁸⁷ The parties to the agreement envision a force which will be based in their home countries and assembled only for training purposes or for peace operations approved by both the Security Council and their own national governments.⁸⁸ Additionally, the agreement contains an opt-out provision wherein each country can decide not to contribute forces for a particular operation, while the other members can press ahead.⁸⁹

⁸³ See Paul Lewis, *France's U.N. Plan at Odds with U.S.*, N.Y. TIMES, Feb. 2, 1992, at 7 (reporting France's offer to put 1,000 French soldiers on 48 hour notice for UN peacekeeping duty -- a plan the U.S. did not endorse. It's interesting to note that although the French proposed the idea in 1992 they never implemented it, nor are they a member of SHIRBRIG).

⁸⁴ See *Supplement to an Agenda For Peace*, *supra* note 12, para. 43.

⁸⁵ The original parties to the agreement were Denmark, Sweden, Canada, Poland, Norway, Austria, and the Netherlands. *SHIRBIG Accord Steps Up UN Ability to Deploy Peacekeepers to Crisis Areas*, JANE'S DEF. WKLY., Jan. 8, 1997, at 20. Later, Argentina, Belgium, the Czech Republic, Finland, and Ireland agreed to participate as observers. *UN Head Urges Support for New Standby Force*, JANE'S DEF. WKLY., Sept. 10, 1997, at 8. However, by December 1997, Poland had not yet joined the steering committee for the group. *Dutch Join UN SHIRBRIG*, JANE'S DEF. WKLY., Dec. 10, 1997, at 14.

⁸⁶ See *SHIRBIG Accord Steps Up UN Ability to Deploy Peacekeepers to Crisis Areas*, *supra* note 85.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

This last provision calls into question the actual utility of the force, especially in light of its composition and logistics. Manned with a maximum of only 4000 troops, it is designed for light peacekeeping duties in "potential conflict areas but where there is little danger of fighting breaking out."⁹⁰ The force will also be dependent on logistical support and airlift from other nations.⁹¹ Obviously, even a small opposing force would quickly outgun this modest force if the situation turned hostile. Speaking of similar proposed forces, one expert noted that they would serve as little more than a "trip-wire," putting a "would-be aggressor on notice that moving his forces ... would involve him in armed conflict with the Security Council and the entire world."⁹²

Its status as a trip-wire should be small comfort to any rapid reaction force. Even strong supporters of the UN have concluded that the most ambitious UN standing army will probably not boast enough force to oppose a "medium grade belligerent."⁹³ Those forces would, of course, be dependent on a logistics tail composed of expensive air- and sea-lift -- forces which the UN also does not possess. In order to bail these components out, the national forces of the members would have to become involved quickly after all. In the final

⁹⁰ See *UN Head Urges Support for New Standby Force*, *supra* note 85.

⁹¹ See *Dutch Join UN SHIRBRIG*, *supra* note 85.

⁹² Professor Robert Turner, *quoted in* Rossman, *supra* note 70, at 258.

⁹³ See *WORDS TO DEEDS*, *supra* note 66, at 33. The Secretary General hypothesizes that he currently has a commitment of about 88,000 troops from 70 countries "potentially available." See *Secretary-General Says Initiative is Milestone in Efforts to Enhance UN machinery for Peace*, *supra* note 82.

analysis, then, without an Article 43 force or a credible UN rapid response force, the UN is totally dependent on the uncertain political will of the supporting member states.⁹⁴

B. Political Disagreements and Financial Woes

The truth is that neither the U.S. nor the Soviets had ever really developed the political commitment to the central idea of the U.N., which would have been necessary to make it work, the sort of commitment, for example, which the constituents of our domestic system have to the U.S. Constitution. That takes not merely political will but reciprocal confidence, rooted in trust that the other side will play by the rules established in the fundamental document if we do.⁹⁵

The above quote was written during the Cold War, but the reality is that political division within the UN has never been limited strictly to the East-West conflict. President Charles de Gaulle reportedly was fond of calling the institution the "Disunited Nations," devoting itself to "world disorder."⁹⁶ Speaking in 1961 against the backdrop of the Congo peacekeeping initiative, de Gaulle had the opportunity to witness first hand the trends that are

⁹⁴ See WORDS TO DEEDS, *supra* note 66, at 32-33. Despite the current optimism over the rapid reaction force, whether it be the SHIRBRIG or some other force, the enthusiasm is not universal. Apparently some countries with less than sterling civil rights records or with skeletons in their closets concerning the way they came to power, fear the force will be used against them. Others do not want their nationals to spend extended periods under UN command. Costs are always a concern. *Id.* In the United States, there is strong support for the proposition that the President can never relinquish policy command to the UN. See David Kaye, *Are There Limits to Military Alliance? Presidential Power to Place American Troops Under Non-American Commanders*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 399, 439 (1995). Critics argue the President abrogated his constitutional responsibility as commander and chief in Bosnia and Somalia because he allowed non-U.S. actors decide when and where U.S. force would be employed. *Id.* This led President Clinton to declare, "The President retains and will never relinquish command authority over U.S. forces." His declaration, PDD 25 also says that large scale combat deployments should be under U.S. command and operational control or "through competent regional organizations such as NATO or ad hoc coalitions," and that "No president has ever relinquished command over U.S. forces. Command constitutes the authority to issue orders covering every aspect of military operations and administration. "[But if operational control is given to a UN commander], U.S. commanders will maintain the capability to report separately to higher U.S. military authorities, as well as the UN commander." See PDD 25, *supra* note 74, at 807-809.

⁹⁵ See FRANCK, *supra* note 63, at 59.

now familiar when peace operations go wrong. In the Congo, states which initially supported the operation were disillusioned when it dragged on, and what we now call "mission creep" changed the fundamental nature of the operation.⁹⁷ In an attempt to impose their political will on the peacekeeping process, members voted against the resolutions, withheld funds, had on scene proxies work at cross-purposes, or even threatened to withdraw troops and logistical support.⁹⁸

It should come as no surprise that the divergent political views among nations and between the states and the UN result in frequent deadlocks.⁹⁹ These impasses need not be exclusively Security Council vetoes. Security Council inaction is almost as common. Arguably, the Security Council's aversion to becoming involved in quagmires in the Federal

⁹⁶ Charles Burton Marshall, *Revision of the United Nations Charter*, in *THE UNITED NATIONS IN PERSPECTIVE* 77 (E. Berkeley Tompkins ed., 1972).

⁹⁷ The goal of Resolution 143 was to facilitate the withdrawal of Belgian forces from the Congo and enable the Congolese forces to restore order. When secessionist movements continued to threaten the country's stability, the Security Council authorized its force to maintain the territorial integrity and political independence of the country. See S.C. Res. 161, U.N. SCOR, 16th Sess., 942nd mtg., U.N. Doc. S/4722 (1961). Still later in November 1961, the Security Council authorized ONUC to arrest and deport all foreign mercenaries in the country who were there (usually with the backing of an outside government) supporting the various secessionist forces. See S.C. Res. 169, U.N. SCOR, 16th Sess., 982nd mtg., U.N. Doc. S/5002 (1961). From a declared policy of neutrality and non-intervention, these resolutions transformed the operation to a situation where "self-defense" increasingly took on an offensive overtone. See, e.g., MILLER, *supra* note 22, at 96-99; Durch, *supra* note 60, at 327.

⁹⁸ MILLER, *supra* note 22, at 79-80. For a survey of what options the major players chose, see Durch, *supra* note 60, at 322-326.

⁹⁹ For example, the Secretary General is extremely protective of the UN's claimed prerogative of strategic command and control of forces placed at its disposal for peacekeeping. See *Supplement to an Agenda For Peace*, *supra* note 12, paras. 38-42. But see PDD-25, *supra* note 72, at 801 (defining U.S. reasons for involvement in UN peace operations as first, "to persuade others to participate in operations that serve U.S. interests," and second, "to exercise U.S. influence over an important UN mission without unilaterally bearing the burden").

Republic of Yugoslavia, Liberia, and Haiti actually helped prolong the strife in those areas.¹⁰⁰

This type of stalemate is also dangerous because the effort to craft politically acceptable mandates may leave Security Council resolutions vague and subject to differing interpretations by those tasked to carry them out. Setbacks often lead to backlash against the UN.¹⁰¹

Perhaps the damaged relationship between the UN and the United States best illustrates the political and financial problems facing the organization. The U.S. was one of the founding states of the United Nations. It made the UN a pillar of its foreign policy.¹⁰² When the first enforcement action was launched, the U.S. led the way into Korea.¹⁰³ It even

¹⁰⁰ See Borgen, *supra* note 25, at 829. Perhaps the current situation in Kosovo is yet another example of this phenomenon. See Drozdiak, *supra* note 65.

¹⁰¹ See WORDS TO DEEDS, *supra* note 66, at 9, 48. The Congo operation was an early illustration of this phenomenon. Additional examples are Somalia where the mission to protect humanitarian relief turned into a manhunt for a warlord which ultimately got twelve Americans killed; Bosnia before IFOR got involved when the UN's mandate switched uncertainly between humanitarian aid to setting up safe havens, and then using force to actively engage violators of the safe zones. See ADDRESS BY AMBASSADOR RICHARD GARDNER, "Franklin Roosevelt and World Order: The World We Sought and the World We Have," in 142 CONG. REC. S12458 (daily ed. Oct. 21, 1996) (statement of Sen. Kennedy) [hereinafter ADDRESS BY AMBASSADOR RICHARD GARDNER] ("In Somalia and the former Yugoslavia, there were large gaps between the ambitious Security Council mandates and the capacity of the world organization to carry them out. The inevitable result has been disillusionment with the UN, particularly within the United States. These UN operations, as well as the crisis in Rwanda, have called into question a central presumption of collective security -- the willingness of democratic countries to risk casualties in conflict situations 'anywhere in the world,' where they do not see their vital interests as being at stake."). See also NATION AGAINST NATION, *supra* note 63, at 174.

¹⁰² See, e.g., ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 174 (1994) (arguing that the UN "was at the center of U.S. foreign policy" during the 1950's and 1960's as it argued for an expansive view of what the UN could take on, while conversely the Soviets advocated a very conservative approach).

¹⁰³ S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., U.N. Doc. S/INF/5/Rev.1 (1950) delegated the Security Council's command and control of UN operations in Korea to the U.S.

insisted against its own allies that the Suez Crisis be resolved through the auspices of the UN.¹⁰⁴

The UN grew rapidly in its first twenty-five years. Membership expanded from 51 at or near inception to 127 members by 1972.¹⁰⁵ Most of the new members were from developing nations. The General Assembly came to be dominated by their voices calling for economic aid for development. The "nonaligned" bloc of newly admitted states often voted against the interests of the United States.¹⁰⁶ Since the U.S. was the major contributor to the UN budget, U.S. policy-makers debated the wisdom of the investment.¹⁰⁷

At first, the United States focused on the nonaligned and Soviet blocs as the source of its disillusionment.¹⁰⁸ Later, the target of U.S. displeasure shifted to the world organization itself, with some U.S. interests advocating that the U.S. use its financial clout to motivate the

¹⁰⁴ See *supra* note 63 and accompanying text.

¹⁰⁵ Carlos P. Romulo, *Crosscurrents in the U.N.*, in THE UNITED NATIONS IN PERSPECTIVE 92 (1972).

¹⁰⁶ *Id.* at 92-95. See also Opinion, *A Poor Investment*, SAN DIEGO UNION-TRIB., Mar. 19, 1984, at B6 (describing the UN as "a sounding board for diatribes against America" and stating that UN members vote against the U.S. 75 percent of the time; additionally, the nonaligned nations of Africa, Asia, and Latin and South America voted with the U.S. only about 20 percent of the time).

¹⁰⁷ By the early 1980's the U.S. Ambassador to the UN, Jeanne Kirkpatrick, began to describe the organization as "a very dismal show." JEANNE KIRKPATRICK, ADDRESS TO THE AMERICAN LEGION, *quoted in* Editorial, "Dismal Show" Deplored, OKLA. CITY TIMES, Feb. 23, 1982, *available in* 1982 WL 2393074. She believed that the General Assembly allowed small countries to dominate the discussion and that their involvement actually helped polarize the world making conflict resolution more difficult. *Id.* Ambassador Kirkpatrick began to support the idea of selective cuts in U.S. funding for the UN. See Editorial, *Waffling on the UN*, DAILY OKLAHOMAN, Oct. 8, 1983, *available in* 1983 WL 2169569; see also Opinion *supra* note 104 ("What's worse, the United States pays for this abuse. The U.S. treasury bankrolls a quarter of the United Nation's total budget. And because most nations fail to pay their share of the bill, the American contribution usually rises to more than a third.").

UN to make needed organizational changes.¹⁰⁹ For a brief period during the Reagan administration, Congress followed through on its threats, drastically cutting back U.S. contributions to the UN. However, the administration came to believe that the cuts hurt the U.S. more than they helped, because they undermined U.S. foreign policy goals.¹¹⁰

When President Clinton took office, he reportedly backed increased participation in UN initiatives. However, a Republican majority in Congress became even more critical of the UN bureaucracy than had been members of the Reagan administration. Their perceptions that the UN was an overblown and inefficient organization were enhanced by the UN's operational failures in Somalia and Bosnia.¹¹¹ This time, the U.S. removed almost all financial backing for the UN, plunging it into its present financial morass.¹¹²

The UN did not help its cause. It moved too slowly to implement the organizational changes, which it finally admitted needing all along. In part, the developing nations hindered

¹⁰⁸ See, e.g., Andrew Radolf, Opinion, *U.S. Turns Up Heat on Bias at the U.N.*, SAN DIEGO UNION-TRIB., Apr. 29, 1984, at C5 (describing the results of a "report card" which helped the U.S. determine how much foreign aid it should allocate to a country based on its UN voting record).

¹⁰⁹ See *id.* The Nichols Amendment to the UN Participation Act, called for a review of "how well the UN is fulfilling [its] mandate ... to maintain international security and promote 'peaceful relations among states.'" The UN budgeting process came under attack. See *U.N. Wasting U.S. Tax Money, Heritage Says*, SAN DIEGO UNION-TRIB., June 19, 1984, at A4.

¹¹⁰ See, e.g., *Reagan Reverses Stance, Tries to Restore U.N. Funding*, N.Y. TIMES, Sept. 14, 1986, at A2; *Reagan Urges Congress to Restore U.N.'s \$79.2 Million*, L.A. TIMES, July 22, 1987, at 1.

¹¹¹ See, e.g., *GOP Casts Pall Over U.N. Anniversary*, DAL. MORN. NEWS, Jan. 1, 1995, at A23; Christian Chaise, *Clinton Has No "Instant Solution" to UN Debt Problem*, AGENCE FRANCE PRESSE, Oct. 20, 1995, available in 1995 WL 7870821; Bob Dole, *Dole to Introduce Bill Targeting Outrageous U.N. Taxation Schemes*, F.D.C.H., Jan. 17, 1996, available in 1996 WL 5167019; Editorial, *Split Policy at the U.N.*, WASH. POST, Sept. 24, 1997, at A20. At the present time, political differences have prevented any money from being appropriated for UN purposes in fiscal year 1998. See Goshko, *supra* note 18.

¹¹² See *supra* note 18 and accompanying text.

change because they insisted that the UN's major function should be rendering economic aid.¹¹³ Nevertheless, U.S. complaints about the speed of reform led directly to the ouster of Boutros-Ghali from the Secretary-General post.¹¹⁴

Meanwhile, the financial debacle has caused other ripple effects. As a result of the shortfall in funding, the UN cannot reimburse participating states for their peacekeeping activities. In turn, those states cannot, or will not, participate in future operations without such funding.¹¹⁵ When the UN cannot fill the peacekeeping role, regional organizations are the logical entities to step in to impose a solution.

C. Command and Control of Resources and Troops

In the golden age of peacekeeping following the Suez Crisis, peace operations occurred after two sovereign nations agreed to stop fighting and they were willing to have the United Nations help them to keep their promises by deploying along their borders. Secretary General Hammarskjöld set three straight-forward rules for deploying peacekeeping troops: (1) the nations consent to their presence; (2) minimum use of force in self-defense or to defend the mission; and (3) the peacekeeping force must remain strictly neutral.¹¹⁶ The first expansion of those concepts occurred in Lebanon and Jordan when the UN agreed to deploy

¹¹³ John M. Goshko, *U.N. at Odds Over Needs of Africa*, WASH. POST, Sept. 26, 1997, at A19.

¹¹⁴ See *Top U.N. Post Now Wide Open*, *supra* note 65.

¹¹⁵ See Findlay, *supra* note 57, at 30.

¹¹⁶ ARTHUR LEE BURNS AND NINA HEATHCOTE, *PEACE-KEEPING BY U.N. FORCES* 18 (1963).

peacekeeping forces within a state upon its consent if there was evidence that outside forces were influencing internal events.¹¹⁷

Events in the Congo strained the basic rules to the limits -- most would say past the cracking point. The Congo operation prompted Brian Urquhart to observe, "The moment a peace-keeping force starts killing people it becomes part of the conflict it is supposed to be controlling, and therefore a part of the problem."¹¹⁸ He apparently believed that taking sides or using force in any way beyond self-defense would cause the UN to lose its aura of international respect.

Nevertheless, the spectrum of peace operations has continually expanded. Peacekeeping itself seems to include everything from traditional border watch up to the more "robust" actions now called "peace enforcement."¹¹⁹ Peace enforcement is the most radical new concept. First authorized in Somalia to protect humanitarian relief operations, peace enforcement allows forces carrying out the Security Council mandate to use "all necessary

¹¹⁷ *Id.* at 22.

¹¹⁸ URQUHART, *supra* note 58, at 179.

¹¹⁹ See Findlay, *supra* note 57, at 17, 18 (identifying the range of activities now considered peacekeeping: disarmament (Somalia, Haiti); promotion and protection of human rights (Cambodia, El Salvador); mine clearance, training, and awareness (Afghanistan, Cambodia); military and police training (Cambodia, Haiti); boundary demarcation (Kuwait-Iraq); civil administration (Cambodia); refugee assistance and repatriation (FRY, Somalia, others); reconstruction and development (Somalia); maintenance of law and order (Cambodia and Somalia)).

means” to protect the mission without the consent of the state or the parties involved. At the same time, the intervenors maintain the fiction that they are not a non-belligerent force.¹²⁰

This evolution in peacekeeping places heavily armed troops, often without specific training in peace operations, in situations where cease-fires are uncertain or nonexistent.¹²¹ This has triggered an enormous debate within the peacekeeping community. Proponents of the so-called “Scandinavian model” agree with Sir Urquhart that use of force only demeans the international organization and leaves it open to charges of favoritism. Conversely, advocates of the “British model” of “robust” peacekeeping seem to be prevailing.¹²²

The complexity of new peace operations reveals the failings of the UN command structure. “[T]he ad hoc, amateurish, almost casual methods of the past simply could not keep pace, resulting in disorganization, mismanagement and waste.”¹²³ Coordination between the civilian and military arms of the UN has always been difficult during armed conflict.¹²⁴ Now, command and control is critical. Despite prodding of the UN by the U.S.

¹²⁰ Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT’L L. 93, 105-107 (1996).

¹²¹ See Findlay, *supra* note 57, at 1. The end of the Cold War has actually complicated matters. More forces have been freed up for peacekeeping duties, but have little training for it. At the same time, peacekeeping has become much more complicated as “second generation peace-keeping” attempts to impose a solution on the conflict by either diplomatic or military means. *Id.* at 13. Often consent is weak, or missing entirely by the time the forces are on the ground. *Id.* at 24.

¹²² *Id.* at 24-27.

¹²³ *Id.* at 18.

¹²⁴ See, e.g., MILLER, *supra* note 22, at 88, note 35 (detailing the problems involved with coordinating the Congo mission: language problems, incompatible equipment and procedures, lack of common training and staff structures, and twisting chains of command); Findlay, *supra* note 57, at 25.

and others, a recent report from a pro-UN American group still characterizes the results of the reform effort as "woefully inadequate."¹²⁵

Regional organizations are increasingly called to fill these gaps in the UN peace operations system. From a political and operational standpoint, it makes sense for the regional organizations to conduct peace operations. First, they are more likely to act in areas where they perceive that their vital national interests are threatened. Second, they are less likely to sabotage the mission when their own troops are on the ground. Third, they train together regularly, usually under identified chains of command, and have forged common doctrine, rules of engagement, and divisions of labor. Finally, while members of the regional organization will surely have their political differences, they form bonds over time that are usually absent from short term "coalitions of the willing."

III. Legal Basis for Regional Efforts

The legal basis for regional involvement in peace operations is already in place. Chapter VIII of the UN Charter protects the rights of regional organizations to exist and to deal with regional matters "consistent with the purposes and principles of the United Nations."¹²⁶ However, these rights were hard won and, until recently, somewhat hollow, as the UN has attempted to define the regional organizations' role very narrowly. The reasons

¹²⁵ See WORDS TO DEEDS, *supra* note 66, at 6.

¹²⁶ See U.N. CHARTER art. 52(1).

for this approach are rooted in the history of the Charter negotiations and in historical fears of establishing "spheres of influence."¹²⁷

A. Legal Framework

During negotiations at Dumbarton Oaks in Washington, D.C., the preliminary draft proclaimed the United Nations the only international organization to which disputes between states could be submitted. One bloc, led by the Latin American nations, complained that this arrangement would take away their ability to respond in self-defense. They also felt that the proposed Charter would encroach too deeply on their capacity to resolve local issues and bypass regional organizations already in existence. Another group, the victorious Allied Powers, wanted the flexibility to deal with a possibly resurgent Germany and Japan.¹²⁸

Diplomats opposed to regional organizations feared that if these groups were coequal with the UN they would render the world organization impotent and lead to regional hegemony by

¹²⁷ "[T]here are undoubtedly ... considerations ... which point to the need for great caution in admitting such [regional] arrangements into a global system. For one thing, they have too often in the past been the occasion for fear and suspicion instead of inspiring confidence and cooperation ... Furthermore, they tend to emphasize limited commitments, whereas modern war and the increasing interdependence of the modern world reduce the possibility of thinking realistically in such terms." LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 310 (1949). See also ROBERT C. HILDERBRAND, *DUMBARTON OAKS* 24, 25 (1990) (relating Secretary of State Cordell Hull's fears that regionalism would inhibit free trade and would be subject to abuse by the Great Powers who would dominate them. He also wished to avoid an excuse for U.S. isolationism, which might recur if the U.S. were given the choice of only participating in the Western Hemisphere).

¹²⁸ Arend, *supra* note 21, at 7-18. Within the American camp, opinion was apparently split. As related, fearing a slip back into American isolationism, Secretary of State, Cordell Hull believed in a strong, central UN. See HILDERBRAND, *supra* note 127, at 24. Conversely, Senator Vandenberg, the American delegate to the regional committee at the San Francisco Conference, wanted to support the Latin American proposals. *Id.* at 6, 11-12. See also Borgen, *supra* note 25, at 798-799 (agreeing that it was a push from the Americans, North and South which led to the drafting of Chapter VIII).

a few powerful states or alliances.¹²⁹ Ultimately, the parties compromised on Chapter VIII and the “inherent right to self-defense” principle of Article 51.¹³⁰

In an effort to balance the competing interests between the world body and the regional organizations, the drafters developed a complex scheme of articles requiring states to move between Chapter VI and Chapter VIII. However, no matter how nimbly the reader jumps, these competing provisions are difficult to harmonize. For instance, Article 33 says that members “may” seek to resolve disputes at the regional level before resorting to the Security Council.¹³¹ On the other hand, Article 52 says that members of regional arrangements “shall” resort to the regional forum first before referring disputes to the

¹²⁹ Arend, *supra* note 21, at 12. Essentially, this is the “spheres of influence” argument mentioned above. The resistance to participation by regional organizations in peace activities did not go away with the adoption of Chapter VIII. Apprehension of “spheres of influence” is still one of the leading non-legal arguments for resisting expansion of the regionals role. See, e.g., Stromseth, *supra* note 25, at 498 (arguing that a greater out-of-area role for NATO might be viewed by weaker states as colonial power strong-arming); Binaifer Nowrojee, *Joining Forces: United Nations and Regional Peacekeeping -- Lessons Learned from Liberia*, 8 HARV. HUM. RTS. J. 129, 148 (1995) (decrying the role Nigeria has taken in Liberia because “the broad power given to regional organizations raises the risk of regional expansionist tendencies that could jeopardize the perceived impartiality of the United Nations and eventually discredit the peacekeeping process”); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT’L L. 209, 228-229 (1996) (reasoning that the regional organization’s proximity and familiarity with the warring parties may generate more bias or self-interest than other states might have and that their actions may conceal driving interests of the regions most powerful members); *But see id.* (supporting regional involvement because multilateral decision-making requires consensus among states which have diverse interests lessening chance that acts are purely in self-interest and “the member states are likely to have a greater expertise on issues driving the conflict and greater familiarity with the warring parties than extra-regional actors”); WORDS TO DEEDS, *supra* note 66, at 42 (admitting regionals are often more familiar with the problems, the players, the history, and the subtleties of the situation).

¹³⁰ See U.N. CHARTER art. 51. Those critical of the compromise term the deal the “three concessions.” See Henrikson, *supra* note 13, at 38-41: The concessions are: (1) the right to submit disputes to a regional organization first; (2) continued operation of existing mutual defense pacts and recognition of right to preemptive enforcement actions in those regions; and (3) the inherent right to individual and collective self-defense. *Id.* *But see* GOODRICH & HAMBRO, *supra* note 127, at 309 (arguing that the inclusion of these provisions was probably inevitable given the limited ability of most states to project power far beyond their borders, that national interests drive the decisions of states, and the demonstrated willingness of states in the past to enter into such arrangements when they have common interests at stake).

Security Council.¹³² The article also directs the Security Council to refer disputes to the regional organization for pacific settlement.¹³³ Finally, the same article purports to take away with one hand what it has just given with the other.¹³⁴ Article 52, Section 4, says that despite the language of the first three paragraphs, the Security Council's power to investigate disputes which may endanger international peace and security,¹³⁵ and the ability of member states to bring these disputes to the attention of the Security Council, is not impaired.¹³⁶

What is left unsaid in Article 52 is perhaps as important as what is said. By retaining a niche for the Security Council in Article 52(4), does the Charter imply that the Security Council has the sole power to "recommend appropriate procedures or methods of adjustment" under Article 36¹³⁷ and the sole power to "decide whether to take action under 37?"¹³⁸ These are the provisions commonly regarded as the basis for the "Chapter Six and a half" peacekeeping powers. If so, the rest of Article 52 is rendered meaningless. Conversely, if Article 52 retains meaning, it could support the theory that a regional organization may do anything short of enforcement action as long as it is consistent with the purposes and principles of the UN Charter.¹³⁹

¹³¹ U.N. CHARTER art. 33.

¹³² *Id.* art. 52(2).

¹³³ *Id.* art. 52(3).

¹³⁴ *Id.* art. 52(4).

¹³⁵ *Id.* art. 34.

¹³⁶ *Id.* art. 35.

¹³⁷ *Id.* art. 36(1).

¹³⁸ *Id.* art. 37(1).

¹³⁹ This concept will be explored more extensively *infra* notes 141-147 and accompanying text.

Article 52 also does not contain provisions either requiring the regional organization to seek approval of the Security Council before embarking on attempts to peacefully resolve disputes. Nor does the article require it to cease its efforts once the Security Council becomes involved in a matter. This contrasts with Article 53, which requires regional organizations to gain Security Council approval before conducting enforcement actions. Accordingly, an expansive reading of Article 52 provides the regional organizations a flexible tool with which to perform peace operations.

Commentators writing shortly after the approval of the Charter attempted to reconcile the provisions concerning regional organizations by saying that, by its terms, Article 52 was limited to "local disputes." By local, they meant between members of the regional organization itself.¹⁴⁰ The Security Council would then exercise its pre-eminent right to maintain international peace and security if there was a dispute not involving a member of a regional organization or if the regional organization was unable or unwilling to resolve the

¹⁴⁰ See GOODRICH & HAMBRO, *supra* note 127, at 314, 315 (acknowledging that the Chapter VIII provisions are "not wholly in harmony with the procedures laid down in Chapter VI;" and attempting to reconcile the inconsistencies by limiting regional action to instances which "exclusively involve states which are parties to such regional arrangements"); NORMAN BENTWICH & ANDREW MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 112 (1950) (interpreting the provisions to mean that the regional councils must handle local disputes unless the regional arrangement does not provide for dispute resolution or the matter is beyond its capacity to handle).

dispute.¹⁴¹ In practice, regional organizations do not always confine dispute resolution to member states, and the line between what is and what is not enforcement action is blurred.¹⁴²

At one end of the spectrum, scholars argue for a narrow interpretation of Article 52. The narrowest interpretation would prohibit use of force by a regional organization except in cases of collective self-defense in response to armed attack, or after bringing a situation to the Security Council's attention and obtaining its authorization to use force.¹⁴³ In other words, the regional organization must use diplomacy unless a member state is attacked, but otherwise have to wait for the Security Council to act under article 53 before responding. The danger of this approach is that if the UN is frozen because of veto or indifference, regional action is also handcuffed.

A more relaxed interpretation would allow the regional organization to use force without Security Council authorization, but only within strictly prescribed parameters. The most widely accepted examples are intervention based on invitation of lawful authority and

¹⁴¹ U.N. CHARTER art. 24.

¹⁴² See *supra* note 3. Article 53 of the UN Charter accords the regional organization the right to perform enforcement actions only after approval of the UN Security Council. On the other hand, the Security Council is empowered to task regional organizations with enforcement duties if appropriate. *Id.*

¹⁴³ See Anthony Chukwuka Ofodile, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381, 411-412 (1994) (asserting that the Security Council has the sole prerogative to determine threats to international peace and security, and seeing liberalization of this standard as an invitation to the regional organization to justify their intervening in civil wars at will). Some writers seek to redefine what is meant by "use of force" to include actions such as economic sanctions which can have a profound impact on the internal order of a state. See Borgen, *supra* note 25, at 800 (asserting that the pre-Charter debates indicated the term "enforcement actions" should be a broader concept than the one currently embraced by the Security Council; and noting that during the Cuban missile crisis the Council adopted a more restrictive interpretation to include only affirmative use of force).

for the limited purpose of rescuing foreign nationals trapped within a combat zone.¹⁴⁴

Although this is normally a workable and widely accepted definition, some believe it is also too narrow. For instance, the Charter does not clarify the legal options of a regional organization if a central government of a state collapses or condones widespread human rights abuses. Nor does it define the point at which such a situation becomes "a threat to international peace and security."

Those espousing a more liberal interpretation of Article 52 claim that a regional organization can project force into the sovereign territory of another nation without Security Council approval as long as it does so "in conformity with the purposes and principles of the UN Charter."¹⁴⁵ The argument is that regional action is lawful if its aims are primarily to address "humanitarian" concerns for the victims of the breakdown of law and order. Although the intervenors are not expected to abrogate all self-interest, their actions must not be motivated primarily by a desire to change the receiving state's form of government, or an excuse for regional hegemony. Attempts to redefine borders are especially frowned upon.¹⁴⁶

¹⁴⁴ Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 803 (1993).

¹⁴⁵ See U.N. CHARTER art. 52(1). See also *id.* art. 2(4) which prohibits use of force or threats thereof against the political independence or territorial integrity of a state or for any other end inconsistent with the purposes and principles of the UN Charter.

¹⁴⁶ See, e.g., Moore, *supra* note 22, at 145 ("Actions to restore order and self-determination in a setting of breakdown of authority are not enforcement actions, which would require Security Council approval, and may be taken at the initiative of a genuinely independent regional arrangement."); Nowrojee, *supra* note 129, at 131-132 (arguing that "genuinely independent regional intervention" is lawful in the context of humanitarian intervention); Lori Fisler Damrosch, *Introduction*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 1, 3 (Lori Fisler Damrosch ed., 1993) (declaring that the present system is designed to keep states from unilaterally projecting force into another state to effect its internal government, and that it is not self-evident that the same constraints apply to altruistic collectives working for the common good). See

Currently, the widest expansion of article 52 is espoused by writers asserting that states have "both the right and the duty" to intervene if a democratically elected government is overthrown.¹⁴⁷ However, many scholars are uncomfortable with throwing the door to article 52 action that wide open to interventionism.¹⁴⁸ They conclude that support for humanitarian or "democratic" intervention requires support either by a change to Chapter VIII, a specific authorization in the regional organization's charter, or both.¹⁴⁹

After fifty years of debate, there is still no settled consensus on the meaning attached to the provisions in Chapter VIII.¹⁵⁰ At most, there is only agreement that there is a "gray area" in which use of force by a regional organization short of direct enforcement action is

FRANCK, *supra* note 63, at 166-167 (discussing India's ulterior motives for invading East Pakistan, now Bangladesh, disguised behind humanitarian motives).

¹⁴⁷ Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163, 167 (1993). See also Damrosch, *supra* note 146, at 12 (listing democratic intervention as one instance where the international community has shown a recent willingness to support when pursued by a broad based coalition). The concept of democratic intervention will be discussed in more detail *infra* at notes 327 to 356 and accompanying text.

¹⁴⁸ See, e.g., Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 271 (1997) (asserting democratic intervention is not justifiable without Security Council approval). For that matter, many are also unwilling to accept the position the U.S. took in the Cuban missile crisis and the Dominican Republic operation, see *infra* note 173 and accompanying text, that a regional is authorized to perform enforcement actions as long as its actions are not condemned by the Security Council. David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 187 (Lori Fisler Damrosch ed., 1993).

¹⁴⁹ See, e.g., Borgen, *supra* note 25, at 799, 800 (explaining his thesis that in order to find "appropriateness" of regional action in today's world one must go outside the UN Charter to examine "the charters of the regional organizations themselves;" reporting the OAS position that an action requiring use of force must not only be authorized by Chapter VIII, but also under the regionals own charter; and, advocating a change to Chapter VIII to clarify what actions are permissible under Article 52).

¹⁵⁰ John F. Murphy, *Force of Arms*, in THE UNITED NATIONS AND INTERNATIONAL LAW 120 (Christopher C. Joyner ed., 1997).

permissible.¹⁵¹ As the case studies that follow demonstrate, this ambiguity and its resulting tension between the UN and regional organizations greatly influenced their emerging legal relationship.¹⁵²

B. The Beginning of Customary International Law on Peace Operations

Prior to 1965, there was little reason to resolve the balance of power between the UN and regional organizations, because the regional organizations did not often act. There were two attempts to involve NATO in peacekeeping, once in the Suez¹⁵³ and again in Cyprus, but neither was implemented.¹⁵⁴ During the Cuban missile crisis, the United States sought and received the backing of the Organization of American States (OAS) to establish a partial

¹⁵¹ *Id.* at 118. See also Wippman, *supra* note 148, at 231 ("The denotation of [the force] as a peacekeeping force frees the [Security Council] delegates from having to consider awkward questions about retroactive validation of ... use of force under chapter VIII ... they do not distinguish ... actions that might constitute peaceful regional measures under article 52 ... and actions that might more appropriately be considered regional enforcement action under article 53 ..."); Joachim Wolf, *Regional Arrangements and the U.N. Charter*, in 6 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 289, 291 (Max Planck Institute ed., 1983) (asserting the appropriateness of regional action is based on the existence of a local dispute on the regional organization's choice of peaceful means to settle it).

¹⁵² While approving the concept that the disagreement over what is and what is not enforcement action has enhanced the tension between the UN and regional organizations, Anthony Clark Arend argues that just as often conflict results because the "initial jurisdiction" of a dispute is unclear. Either one organization takes action at the expense of the other, or alternately both organizations may hesitate while waiting to see if the other will act. He uses the examples of the Gulf War, where some members of the Arab League complained the UN acted too precipitously before the League had a chance to resolve the situation; the Balkans, where the UN's first inclination was to try and let Europe work out a solution; and Haiti where the OAS took the lead although that organization wanted UN involvement. See Arend, *supra* note 21, at 18-26.

¹⁵³ As noted in URQUHART, *supra* note 58, in 1956 the United States turned down a joint plan by Britain and France to have NATO separate the forces.

¹⁵⁴ See MILLER, *supra* note 22, at 121. In 1964 the British attempted to work out a cease-fire arrangement between Greece, Turkey, and Cypriot forces. A 10,000 man NATO force was to supervise the agreement. The U.S. backed the plan, but ultimately the Cypriot President, Archbishop Makarios, nixed the idea. *Id.*

blockade of the island. However, only U.S. vessels carried out the "quarantine" of Cuba. Of course, no ground troops were projected onto the island.¹⁵⁵

1. *The Dominican Republic*--The Dominican Republic operation by OAS was the first real test of a regional force in action under Chapter VIII. On April 25, 1965, a coup toppled the military government which had itself disposed of a democratically elected president two years prior.¹⁵⁶ After the rebels (or "Constitutionists") installed a new president, Loyalist troops attacked, and a civil war began. On the same day, the U.S. ordered a naval task force to the island, anticipating a need to evacuate American citizens. Before the evacuation occurred, the U.S. received information that indicated that the rebel government was Communist-dominated.

The mission was modified. Washington directed the task force to "restore law and order, prevent a Communist take-over of the country, and protect American lives."¹⁵⁷ These directions, which were later made public,¹⁵⁸ caused some embarrassment to the U.S. in convincing the rest of the world that this was a legitimate intervention under Chapter VIII:

¹⁵⁵ See Murphy, *supra* note 150, at 119-120. The action was specifically taken under the auspices of the OAS acting as a Chapter VIII regional organization. The U.S. argued that the quarantine was not an enforcement action and therefore required no Security Council blessing. Alternately, the U.S. said even if the action could be classified as enforcement the Security Council had implicitly endorsed the action by failing to adopt a draft Soviet resolution condemning the quarantine. *Id.* See also Wippman, *supra* note 148, at 186, 187 (noting the U.S. stance, but also acknowledging that most states rejected the U.S. view).

¹⁵⁶ Chronology of events taken from LAWRENCE A. YATES, POWER PACK: U.S. INTERVENTION IN THE DOMINICAN REPUBLIC 181-186 (1969) [hereinafter POWER PACK]. Power Pack was the U.S. code name for the Dominican operation. *Id.* at 183.

¹⁵⁷ *Id.* at 182.

Nevertheless, the American naval forces, joined by the 82nd Airborne, quickly established a separation zone between the combatant forces.

After the U.S. intervened, the OAS immediately called for a cease-fire.¹⁵⁹ A number of OAS members were convinced that the U.S. intervention was in violation of the OAS Charter¹⁶⁰ and were prepared to condemn the U.S. action.¹⁶¹ However, a majority adopted a resolution to “internationalize” the peacekeeping force and agreed to form the Inter-American Peace Force (IAPF).¹⁶²

The provisions accompanying the resolution stated that the goals of the IAPF were to “cooperate in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establishing of an atmosphere of peace and conciliation that will permit the functioning of democratic

¹⁵⁸ White House press release, May 2, 1965, *reprinted in* DEPARTMENT OF STATE BULLETIN, No. 1351 (May 17, 1965, 744, *cited in* MILLER, *supra* note 22, at 151.

¹⁵⁹ M. MARGARET BALL, *THE OAS IN TRANSITION* 472 (1969).

¹⁶⁰ Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter]. At the time of the action articles 15 and 18 read, respectively and in pertinent part, “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State” and, “[t]he American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.” *Id.*

¹⁶¹ See BALL, *supra* note 159, at 474.

¹⁶² Resolution Adopted in the Third Plenary Session of the 10th Meeting of the Consultation of Ministers of Foreign Affairs of the Organization of American States, OAS Doc. 39 Rev. Corr. (1965), *reprinted in* 4 I.L.M. 594 (1965) [hereinafter Resolution 39]. Six out of twenty countries represented at the Consultation believed the U.S. action was an outright violation of the OAS Charter, before reaching the question whether it was in violation of the UN Charter. Those countries were Ecuador, Chile, Uruguay, Peru, Venezuela, and Mexico. Despite its belief, Venezuela abstained from the vote, probably because they were having problems with Cuban supported guerrilla groups at the time. See BALL, *supra* note 159, at 474, 475.

institutions.”¹⁶³ The resolution informed the UN Security Council of its action, but did not request its blessing.¹⁶⁴ The IAPF assumed control of all military operations on May 29, 1965.¹⁶⁵ Thereafter, the OAS forces, including up to 10,000 American troops, remained in effective control of the Dominican Republic. After presidential elections were held in June 1966, the OAS terminated the IAPF mandate. All foreign forces withdrew by September 1966.¹⁶⁶

As noted above, the U.S. stated three reasons to justify its intervention. First, it claimed the right to protect its citizens’ lives. Although the initial U.S. intervention may have been warranted on this basis, the operation quickly progressed beyond the parameters of self-defense.¹⁶⁷ The second justification asserted by the U.S. was that the Dominican insurgency was being directed and controlled by an outside force, namely Communist Cuba.

¹⁶³ Resolution 39, *supra* note 162, para. 2.

¹⁶⁴ *Id.* para. 7.

¹⁶⁵ A Brazilian general assumed command of the force -- one of the few times in its history that the U.S. government has surrendered tactical command and control of American soldiers to a foreign commander. See MILLER, *supra* note 22, at 158; POWER PACK, *supra* note 156, at 150. As discussed *supra* note 94, there is a strong constitutional argument that the executive may relinquish tactical control to a foreign commander only in emergency situations.

¹⁶⁶ See POWER PACK, *supra* note 156, at 185, 186.

¹⁶⁷ J.B.L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 (Robert Lillich ed., 1973). Most authorities agree a state has an inherent right and duty to protect its citizens. A caveat to that right is the expectation that the intervention will be strictly limited to that purpose. The legal basis became less clear in the Dominican Republic as the U.S. force actively interposed itself between the combatants. Still later, the U.S. extended its security perimeter outwards, squeezing the rebel forces into a smaller area, but at the same time protecting them from Loyalist attacks. See POWER PACK, *supra* note 156, at 183-85. Shortly after they arrived U.S. forces established an International Security Zone (ISZ). That zone was extended on several occasions as the security needs of the force expanded, and the IAPF sought to enforce cease-fires. *Id.* The conclusion must be that at some point the U.S. intervention lost its legitimacy if it were based solely on protection of its nationals.

By implication, the U.S. mission was prosecuted by virtue of anticipatory self-defense.

However, the OAS reaction clearly did not support that view.¹⁶⁸

The third objective, supported explicitly by the OAS, was to restore law and order. Yet, the OAS action did not fit the classic mold of peacekeeping. As discussed previously, peacekeeping, as understood in 1965, first required consent from all the warring parties. However, the U.S. did not obtain consent from both parties prior to entering the Dominican Republic. In fact, fighting was escalating at the time. Furthermore, after the mission was turned over to the IAPF, the OAS did not obtain consent either. The insurgents lobbied for UN involvement rather than OAS mediation, especially after a U.S. operation designed to enhance the security of the neutrality zone severely constricted the rebel operating area.¹⁶⁹

The IAPF was on more sound footing regarding the other two elements of peacekeeping. Despite some lapses, the IAPF did manage to maintain its neutrality and

¹⁶⁸ There was some historical precedent for the United States position. During the Cuban missile crisis, the U.S. had managed to convince the OAS that the "Marxist-Leninist" doctrine was a threat to the independence of the region's members constituting justification for self-defense. See Resolution VI of the Eighth Meeting of Consultation, Punta del Este, Uruguay, January 1962, in U.N. Doc. S/5075, p. 17 (1962). However, on this occasion when the resolution came up for vote five Latin American countries felt strongly that the OAS Charter precluded intervention in a member state's internal affairs for any reason. The remaining OAS countries voted for the resolution only after amending it to show that they did not approve of the initial U.S. intervention but were prepared to undertake a peacekeeping role anyway. See MILLER, *supra* note 22, at 153. Even those members who voted for the resolution permitting formation of the IAPF consented to an amendment which specifically stated approval of the OAS mission did not signify approval of the initial intervention. See BALL, *supra* note 159, at 480 (arguing this was just as much a defense by the Latin American states against the United States as it was the U.S. acting in self-defense against Communism; their chosen method was not to fight the Americans, but instead to assume the Americans duties).

¹⁶⁹ See MILLER, *supra* note 22, at 156, 162. Conversely, the Loyalists preferred OAS mediation, even though they felt OAS presence effectively kept them from controlling the rest of the country. *Id.*

limited its use of force to self-defense.¹⁷⁰ Regardless of whether the action was called peacekeeping, protection of foreign nationals, or some other form of operation, the U.S. and the OAS felt justified in relying on Chapter VIII of the UN Charter as the basis of their mission. In any event, the international community did not rebut the U.S. assertion that the intervention was not enforcement.¹⁷¹

The UN was effectively shut out of the Dominican conflict. An early draft resolution by the Soviets seeking to condemn the American action failed.¹⁷² When the UN sought to carve out a mediation role for itself, the OAS termed the attempted involvement "obstructionist."¹⁷³ Meanwhile, the U.S. lobbied successfully in the Security Council to have it recognize that the OAS was dealing effectively with the situation and that the UN's participation would be unwarranted duplication of effort.¹⁷⁴ In the end, the UN's role was

¹⁷⁰ *Id.* at 160, 161.

¹⁷¹ The position of the U.S. was that regardless of which justification was accepted the action in question was not enforcement action. *Id.* at 159.

¹⁷² *Id.* at 155, 156. Although the cynical might guess the resolution failed by reason of the U.S. veto, in fact the U.S. abstained from voting. This lends some credence to the U.S. argument that a Chapter VIII enforcement action need not be expressly approved by the Security Council. See, e.g., Murphy, *supra* note 150, at 119, 120 (citing the U.S. position in both the Dominican and Grenadan actions that Security Council approval of regional enforcement action may be implied). In all, the Security Council considered the Soviet proposal in twenty-nine meetings over a three month period, but never reached consensus on a resolution condemning the actions of the U.S. or the IAPF. See THE BLUE HELMETS, *supra* note 61, at 200.

¹⁷³ OAS Doc. 81 Rev. (June 2, 1965), in U.N. Doc. S/6370 and Add. 1 & 2 (1965) (complaining vehemently that the UN was undermining its efforts to negotiate the formation of an interim government).

¹⁷⁴ See FRANCK, *supra* note 63, at 70, 71 (quoting the U.S. Ambassador to the UN, Adlai Stevenson, that UN involvement would "tend to complicate the activities of the Organization of American States by encouraging concurrent and independent considerations and activities ... when the regional organization seems to be dealing with the situation effectively."). See also MILLER, *supra* note 22, at 159 (restating the U.S. position against UN involvement).

limited to sending a representative of the Secretary General with two military advisors to "observe and report."¹⁷⁵

The Dominican operation provides some evidence that customary international law supports an expanded role for NATO under Chapter VIII. First, it shows there is considerable room for maneuver in Article 52 regarding what response a regional organization may legally pursue without UN approval, short of active enforcement measures such as those in Korea and the Persian Gulf. Second, it demonstrates that an effective regional organization can accomplish significant results in peace operations without UN command and control. Nevertheless, the Charter basis for a regional peace operation should be clarified in order to avoid confusion and dissension within the organization itself.

2. *Grenada*--When the United States next performed a peace operation in conjunction with a regional organization, reaction from the UN was even more hostile. On October 25, 1983, acting upon the invitation of the Organization of Eastern Caribbean States (OECS) and cooperating with its forces, the United States invaded the island nation of Grenada. A storm of international criticism washed over the U.S. for its response, including condemnation by the UN General Assembly.¹⁷⁶

¹⁷⁵ THE BLUE HELMETS, *supra* note 61, at 200. Initiatives to expand the representative's role to permit him to supervise cease-fires and investigate complaints of human rights violations failed to receive any support. *Id.* at 203.

Nevertheless, the events leading up to the invasion provides some justification for the U.S. and OECS mission.¹⁷⁷ Grenada was one of seven members of the OECS, along with St. Vincent, St. Lucia, Dominica, Antigua, St. Kitts, and Montserrat. In March 1979, Maurice Bishop led a Communist coup, which overthrew its democratically elected government. Bishop suspended the Constitution and replaced it with several "People's Laws." The new government invited in Cuban advisors, expanded the armed forces, and began constructing a large aircraft runway which many believed would be used as a convenient point of departure for Soviet spy planes to land and refuel before continuing their mission to support the communist insurgency in Angola. The Cubans were expected to use the island as a base for their operations in Latin America. The democratic governments of the other OECS members became concerned their own sovereignty would be threatened, but they were unable to attract much international support for their concerns.

On October 13, 1983, members of his own government deposed Bishop. Reportedly, they believed he was not hard-line enough, and he had sought economic aid from Western countries against their wishes. Country-wide rioting followed, and the government lost effective control of the nation. They attempted to impose a twenty-four hour curfew, with orders to Grenadan forces to "shoot on sight." Even though a number of protesting civilians

¹⁷⁶ G.A. Res. 38/7, U.N. GAOR, 38th Sess., U.N. Doc. A/RES/38/7 (1993). The U.S. never got the chance to plead its case as the Assembly invoked its rule of cloture cutting off debate. U.N. GAOR, at 12-15, U.N. Doc. A/38/PV.43 (1983). The vote was 108 in favor of the resolution, 9 against, with 27 abstentions. *Id.* at 45-50.

¹⁷⁷ Factual details in the next 3 paragraphs are taken from Moore, *supra* note 22, at 145 and Beck, *supra* note 144, at 765.

were killed by armed forces, the rioting continued. Supporters attempted to free Bishop, but he was killed in the attempt.

Meanwhile, the U.S. government had grown concerned for the safety of more than one thousand U.S. citizens trapped on the island, many attending medical school there. President Reagan directed his advisors to develop an evacuation plan and sent state department officials to arrange permission from the remnants of the Grenadan government. Negotiation proved fruitless, mainly because it was impossible to determine who was in charge of the government. It became clear that instead of arranging to let foreign nationals leave, the Grenadan negotiators were unwilling to allow an evacuation under any circumstances. In light of the recent Iranian hostage crisis, President Reagan became convinced that he risked a similar situation if the U.S. did not take immediate steps.

The OECS members had met continuously through the crisis. On October 21, 1983, they extended an oral request for military assistance to the United States to help them "stabilize the situation and establish a peace-keeping force."¹⁷⁸ The United States, mindful of the legal aspects in question, felt that it was important that it receive the request in writing. A written request followed on October 23, 1983.¹⁷⁹ By the time the U.S. received word of an additional request for intervention by the Governor General of Grenada, the U.S./OECS

¹⁷⁸ WILLIAM C. GILMORE, *THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION* 104 (1984). The invitation was also extended to Jamaica and Barbados, which were not members of OECS either.

¹⁷⁹ *Id.* at 100. An account of the behind the scenes negotiations between the U.S., the OECS, Jamaica, and Barbados is in Beck, *supra* note 144, at 783-86.

operation was imminent.¹⁸⁰ The invasion was launched on October 25, 1983. By November 2, 1983, the operation was complete.

The OECS and the U.S. rested their legal justification for the invasion on three bases: (1) protection of foreign nationals, including the U.S. students; (2) the request of lawful authority; and (3) collective action by a regional organization under Article 52 of the UN Charter.¹⁸¹ As was the case in the Dominican operation, the main argument against protection of nationals was the scope of the mission.¹⁸² Intervention based on invitation by lawful authority is also a well-recognized concept in public international law.¹⁸³ The unfortunate difficulty with justifying the intervention on this basis was that at the time Sir

¹⁸⁰ See Beck, *supra* note 144, at 789. Interestingly, these facts were mostly available soon after the OECS intervention. Nevertheless, so great was the international backlash and scholastic sniping that opponents of the operation questioned the respective governments' beliefs that foreign nationals were in danger, whether the U.S. had attempted to resolve the matter peacefully at all, and whether the Governor General had even extended an invitation. Opponents also suggested the U.S. pressured the OECS into acting, and charged that the Reagan administration had been planning the invasion all along. Finally, they disputed whether the Grenadan government had really collapsed. Writing ten years after the incident and drawing from a wide number of sources, Professor Robert J. Beck concluded that the facts were mostly in favor of the U.S. position, even though he also concluded the legal basis for the invasion was lacking. *Id.*

¹⁸¹ *Id.* at 770. Authorities discussing Article 52 in the context of the Grenada invasion mentioned, but did not rely on the concepts of humanitarian and democratic intervention. However, a discussion of those concepts appears later in this thesis to mirror their evolution under Article 52.

¹⁸² Rather than establishing a beach-head and then withdrawing after the students were evacuated, the OECS launched a full invasion, actively engaging forces throughout the island (In point of fact it appears the Grenadan forces did little fighting. Instead the main opposition was provided by Cuban irregulars). Accordingly, the Reagan administration never tried to assert protection of nationals as the sole basis of the intervention. See Moore, *supra* note 22, at 151.

¹⁸³ See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 317 (1963). In this instance, the OECS asserted that the request for intervention by Grenadan Governor General, Paul Scoon, was alone sufficient justification of its action. Under the Grenada Constitution, the Governor General appears to wield broad executive powers, especially if for some reason the prime minister is unable to act. See Moore, *supra* note 22, at 145-48.

Paul Scoon made the request the Grenada Constitution had been suspended. Bishop's "People's Laws" vested all executive and legislative power in his Communist government.¹⁸⁴

Regarding the authority of the OECS to intervene under article 52, the experts are in disagreement. A broad reading of article 52 leads to the conclusion that a regional organization may legitimately intervene to restore order when a state of anarchy prevails in the receiving state.¹⁸⁵ A narrow reading of article 52 leads to an opposite result.¹⁸⁶ The political reaction of the world community at the time affects the development and interpretation of customary international law. Therefore, the reaction of UN member states is instructive.

¹⁸⁴ Neither Beck, *supra* note 144, at 799-800, nor Christopher C. Joyner, *Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 138-139 (1984) rested their arguments against the invasion based solely on the illegitimacy of Governor General Scoon's request. Beck discounts the Governor General's authority, but also noted that his review of the evidence ten years after the event demonstrated that the U.S. had already made the decision to invade prior to receiving word of the request, so it had no impact on the decision. Joyner labels the question "polemical," but doesn't attempt to resolve the controversy. Nevertheless, since he decides the invasion was illegal the conclusion must be that he discounts the claim. *But see* Moore, *supra* note 22, at 153 (arguing that as the only constitutional representative of the government at the time the Governor General's request was alone sufficient legal authority to justify the invasion). At some level it is fundamentally distasteful that a democratically elected government could be forcefully overthrown by an authoritarian regime which could then set up the non-intervention provisions of the UN Charter, found at article 2(7), against the ousted government's plea for outside help. This thesis argues below at the end of section III.C. that the time to recognize the so-called "democratic intervention" doctrine has arrived. However, at the time of the Grenada operation it must be conceded the democratic intervention doctrine had not received sufficient support to raise it as a serious justification of OECS action. Accordingly, it will not be addressed at this point.

¹⁸⁵ *See, e.g.*, Moore, *supra* note 146, and accompanying text. *See also* Wippman, *supra* note 129, at 231 (arguing such a state no longer effectively exists, therefore the intervention is not against a state, and further that it is not an enforcement action under the UN Charter).

¹⁸⁶ *See, e.g.*, Beck, *supra* note 144, and accompanying text (asserting a very narrow band within which a regional organization may use force: collective self-defense, enforcement action after Security Council authorization; and, pursuant to invitation by lawful authority).

However, the General Assembly resolution condemning the invasion does not settle the issue. Such resolutions are not binding international law, although the resolutions may be evidence of international consensus that may lead to development of treaties or customary international law.¹⁸⁷ Further, there is much evidence that the Assembly's reaction was based on the perception that this was not truly a regional action. The evidence suggests that international backlash was driven by the belief that the invitation was a mere cover for U.S. policy objectives -- ousting a Communist government in the western hemisphere and keeping a strategic airport out of Soviet and Cuban hands.¹⁸⁸ Therefore, the reaction of the only official organization to speak for the world community is ambiguous. At most, it stands for the proposition that the organization regards the invasion as a power play by the U.S., not a regional "humanitarian" peacekeeping action.

Another weakness in the Grenada mission was its lack of support in the OECS Charter. The OECS is a sub-regional organization. Therefore, it also must comply with the provisions of the OAS Charter.¹⁸⁹ As in all matters in this controversial operation, the

¹⁸⁷ Christopher C. Joyner, *The United Nations as International Law-Giver*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 443-446 (Christopher C. Joyner ed., 1997).

¹⁸⁸ See Brown, *supra* note 148, at 250 (asserting this belief was driven by the overwhelming composition of the force -- 1900 of 2200 participating troops were American -- and the OECS members were tiny Caribbean states with little voice inside or outside their region). There is much circumstantial support for this idea, especially when one reviews the facts surrounding the Liberian operation discussed *infra* at notes 193 to 215 and the accompanying text. The operation in Liberia was dominated by the forces of one regional power, Nigeria, acting without the consent of a legitimate government, and unauthorized by the Security Council. Yet, the operation drew not a peep of protest from the General Assembly. Under these circumstances, the Assembly's action, as one writer puts it, "speaks with Delphic ambiguity." Tom Farer, *A Paradigm of Legitimate Intervention*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 334 (Lori Fisler Damrosch ed., 1993).

¹⁸⁹ See *supra* note 148 and accompanying text.

authorities are split concerning whether the OECS met those conditions.¹⁹⁰ The United States attached great importance to the issue. It clearly believed that the OECS had authority in its Charter to intervene in Grenada's internal affairs.¹⁹¹

Taking these events into consideration, by 1983 customary international law arguably established three conditions for the validity of regional peace operations. First, the operation must be based on regional charter authority. Second, the intervention must be a truly collective effort and not a mask for regional hegemony. Finally, and most controversially, prior Security Council authorization was not necessarily required. Recent regional peace operations also support this last proposition, while adding further grounds for justifiable intervention.

C. Recent Developments in the Customary International Law of Intervention

Despite the experiences of the United States in the Dominican Republic and Grenada, cooperation between the UN and regional organizations has improved tremendously in recent years. Whatever the reason for the change, this section demonstrates that it has been accompanied by an adjustment in attitude towards the available responses of regional

¹⁹⁰ See, e.g., Moore, *supra* note 22, at 157, 158 (OECS acting in full compliance). But see Beck, *supra* note 144, at 803; and Joyner, *supra* note 184, at 135-36 (OECS violating both Charters); Brown, *supra* note 148, at 249 (invasion beyond the scope of the OECS Treaty). Although it may have been just as restrictive at the time of the invasion, Article 1 of the current version of the OAS Charter, including provisional articles not yet ratified, specifically states, "The Organization of American States has no powers other than those expressly conferred on it by this Charter, none of whose provision authorizes it to intervene in matters that are within the internal jurisdiction of the Member States." OAS CHARTER art. 1, *as amended by* Protocol of Buenos Aires, Feb. 27, 1967, 721 U.N.T.S. 324, *as amended by* Protocol of Cartagena de Indias, Dec. 5, 1985, in 25 I.L.M. 529 (1986). The integrated text of the OAS Charter, including provisional Protocols of Washington (1992) and Managua (1993) appear at 33 I.L.M. 985 (1994).

organizations which seek to conduct peace operations. Case studies in this and the following section regarding recent peace operations in Liberia and Haiti, as well as the NATO operation in Bosnia discussed below in part IV, suggest that humanitarian and democratic interventions are legally valid under Chapter VIII.¹⁹²

1. *ECOWAS in Liberia*--Resistance to the dictatorship of Samuel Doe in Liberia ignited into civil war on Christmas Eve, 1989.¹⁹³ Within six months, there was no semblance of a central government. The three factions struggling for power paid little regard to the civilian population, and human rights violations were widespread on all sides. Appeals from neighboring states for UN action garnered no response. In August 1990, the Economic Community of West African States (ECOWAS) decided to send a "peacekeeping" force, later known as "ECOMOG,"¹⁹⁴ to Monrovia, Liberia's capital, citing a humanitarian need to stop the slaughter and the need to restore regional peace and stability.¹⁹⁵ It announced a three-fold

¹⁹¹ See Beck, *supra* note 144, at 783-86.

¹⁹² This thesis does not discuss the Somalia operation in detail even though it arguably opened the door to acceptance of humanitarian intervention. It is not included as a case study because the operation was carried out by a classic ad hoc coalition under UN authority rather than by a regional organization acting as such. Conversely, the Haiti mission is included despite the fact a UN multinational force conducted the operation. It is included both because it was prompted and to some extent guided by OAS initiatives, and because it provides support for the hypothesis that democratic intervention is now regarded as a legitimate subject justifying external intervention into the internal affairs of a nation.

¹⁹³ Details in this paragraph are taken primarily from Wippman, *supra* note 129, at 224-225, and Wippman, *supra* note 148, at 158-159.

¹⁹⁴ The peacekeeping force was officially designated the ECOWAS Cease-fire Monitoring Group (ECOMOG) by the *Final Communiqué of the First Session of the Community Standing Mediation Committee, ECOWAS*, Banjul, Republic of Gambia, August 6-7, 1990, reprinted in Wippman, *supra* note 148, at 167 n.29.

¹⁹⁵ *Id.*

mission: (1) to establish a cease-fire; (2) to put an end to routine destruction of lives and property; and (3) to ensure free and fair elections would be conducted.¹⁹⁶

The ECOWAS is a collection of sixteen West African states, including Liberia, which decided to cooperate to enhance the economic prospects of its region. It is a sub-regional organization under the auspices of the Organization for African Unity (OAU). Although its charter contains a provision permitting the organization to act in collective self-defense, this authority is a dubious basis on which to justify its intervention into the internal affairs of Liberia.¹⁹⁷ Several members apparently believed it did not. After a five nation standing committee recommended the response, some member states declared that ECOWAS had overstepped its bounds and refused to join in the operation. Nevertheless, the organization's majority vote rule allowed the effort to proceed.¹⁹⁸

Immediately after ECOWAS announced its decision, and before it placed troops on the ground, at least one rebel faction, the National Patriotic Front of Liberia (NPFL) led by Charles Taylor, declared that it would forcefully oppose the peacekeeping force. The Doe faction requested the force proceed, but there is much doubt whether Doe still constituted a

¹⁹⁶ *Id.*

¹⁹⁷ See Wippman, *supra* note 148, at 166. The pact did permit the member states to provide mutual assistance if an internal conflict supported and engineered from the "outside" appeared likely to endanger the peace and security of ECOWAS. What is deemed to be from "outside" is ambiguous. Does it mean from outside the member state experiencing the difficulty, or outside the region itself? There is no evidence any nation from outside the region was involved in fomenting the Liberian insurrection. On the other hand, some fingers pointed to Cote d'Ivoire as the source of arms and supplies for one or more of the rebel factions. *Id.* at 166 n.27.

¹⁹⁸ *Id.* at 167.

“legal authority” who could consent to an armed intervention. Apparently, the ECOWAS did not attach much significance to the invitation either, because it never attempted to justify its action on that basis.¹⁹⁹ Accordingly, when the ECOWAS force hit the ground in Monrovia in August 1990 and was immediately engaged by the NPFL, it could not pretend that it was in Liberia by consent to enforce a cease-fire.²⁰⁰

After a sharp fight, the ECOWAS forces drove Taylor’s group from the capital and established a cease-fire.²⁰¹ It was a shaky peace that would not last. The opposing Liberian forces fractured and reformed several times, creating a politically chaotic situation which twelve peace accords and seventeen cease-fires in the first five-year period could not resolve.²⁰² However, the persistence of the group eventually paid off²⁰³ as fighting subsided,

¹⁹⁹ See Wippman, *supra* note 129, at 224-225 (noting that by the time Doe “consented” he had long since lost control of anything except a small faction calling itself the Armed Forces of Liberia [AFL]).

²⁰⁰ The NPFL accused ECOWAS of being a cover for Nigerian expansionist motives. Nowrojee, *supra* note 129, at 135. Another accusation claimed Nigeria prompted the intervention because it was afraid success by the NPFL would spark an uprising against its own military regime which itself has an appalling human rights record. Ofodile, *supra* note 143, at 397-99, 403. Although these claims may have merit, the critics admit ECOWAS made obvious efforts during the course of the intervention to accommodate the NPFL’s reasonable demands. *Id.* at 385. Nevertheless, similar accusations surfaced during ECOWAS’ most recent intervention in Sierra Leone. ECOWAS agreed to send ECOMOG forces into Sierra Leone after a military junta overthrew the elected president in May 1997. ECOWAS brokered a deal designed to hand power back to the elected government in April 1998, but renewed fighting canceled the bargain. Despite the preference of some ECOWAS members that diplomatic efforts continue, Nigeria apparently took matters in its own hands and decided to impose a military solution. See, e.g., James Rupert, *Forces Press Sierra Leone Government*, WASH. POST, Feb. 11, 1998, at A27; James Rupert, *Nigerians Welcomed in Freetown*, WASH. POST, Feb. 15, 1998, at A27.

²⁰¹ See Ofodile, *supra* note 143, at 385.

²⁰² See *Untitled Article*, AGENCE FRANCE-PRESSE, Aug. 20, 1995, available in 1995 WL 7845970; Nowrojee, *supra* note 129, at 134.

²⁰³ Success is partially attributable to ECOWAS members’ ability to resolve their own differences. By the end of the first year of their peace operation all members agreed to create ECOMOG alleviating some concern that Nigeria was dominating the operation. See Wippman, *supra* note 148, at 167-69. When the Cote d’Ivoire, which had been suspected by some members to be providing arms and supplies to Taylor’s forces, became a

and the factions agreed to national elections in 1997. Although the elections were postponed on several occasions, outside observers certified a "free and fair" election in Liberia in July 1997.²⁰⁴

Although successful, the Liberian campaign by the ECOWAS is legally controversial. From the outset, the regional organization justified its intervention solely on humanitarian grounds. As noted, it did not claim that its operation was based on consent, and it could not claim that it was acting in self-defense. Some of its own members believed that the operation was impermissible under its own charter. Most legal authorities reviewing the ECOWAS Charter agree with that assessment.²⁰⁵ Finally, at no time did ECOWAS seek Security Council authority to conduct the operation.

As usual, the Security Council's reaction to the Liberian intervention was ambiguous. During the first two years of the operation, the Security Council issued two brief statements through its president. The statements merely requested the warring parties to cooperate with the ECOWAS in reaching a peaceful settlement to the conflict, but did not otherwise discuss

member of the standing committee, it was forced into a position where it was responsible for brokering a politically acceptable solution. *Id.* at 170-71.

²⁰⁴ Thalif Deen, *UN Mission Quits Liberia as Peace Goal is Reached*, JANE'S DEF. WKLY, Sept. 3, 1997, at 30.

²⁰⁵ See, e.g., Ofodile, *supra* note 143, at 410-11 ("The Charter of ECOWAS did not empower the organization to involve itself in matters of peace and security."); Nowrojee, *supra* note 129, at 135 (citing "tenuous legal grounds" for intervention under ECOWAS Charter); Wippman, *supra* note 148, at 183-84 (supporting the proposition that a Chapter VIII organization is authorized to use force against a member state only if authorized by its own charter, the charter of any larger regional organization to which it belongs, and pursuant to Security Council authorization, and finding none of those elements clearly in favor of ECOWAS action in this instance); Brown, *supra* note 148, at 256-57 (analyzing the ECOWAS Charter and determining it addressed only international armed conflicts, not internal wars).

the war or the ECOMOG's use of force.²⁰⁶ When the fighting erupted again in November 1992, the ECOWAS asked the Security Council to support its call for an embargo to deprive the Liberian factions of war material. The Council obliged by issuing a resolution which determined that the deteriorating situation in Liberia "constitutes a threat to international peace and security, particularly in West Africa as a whole." Recalling "the provisions of Chapter VIII," the Council commended the ECOWAS and called upon them to continue their efforts.²⁰⁷

Eventually, the Security Council authorized the UN Observer Mission in Liberia (UNOMIL) to monitor the implementation of one of the early peace accords in 1993.²⁰⁸ The Security Council, "noting that this would be the first peace-keeping mission undertaken by the United Nations in cooperation with a peace-keeping mission already set up by another organization,"²⁰⁹ left the actual peacekeeping to ECOMOG while its ninety-member mission verified compliance with the peace accord and the disarmament process.²¹⁰ UNOMIL's mission did not change significantly after this accord broke down and was followed by three more years of intermittent fighting. Throughout the UN's association with the ECOWAS, the Security Council praised the efforts of the regional organization and encouraged the

²⁰⁶ See U.N. SCOR, 46th Sess., 2974th mtg., U.N. Doc. S/22133 (1991); U.N. SCOR, 47th Sess., 3071st mtg., U.N. Doc. S/23886 (1992).

²⁰⁷ S.C. Res. 788, U.N. SCOR, 47th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992).

²⁰⁸ S.C. Res. 866, U.N. SCOR, 48th Sess., 3281st mtg., U.N. Doc. S/RES/866 (1993).

²⁰⁹ *Id.*

²¹⁰ This arrangement was hailed as a possible blueprint for the future. See Nowrojee, *supra* note 129, at 129. To some extent the model has been emulated between the UN and OAS in Haiti, and the UN and NATO in Bosnia.

parties to cooperate with the ECOMOG, but neither explicitly condoned nor condemned its initial intervention.²¹¹

What motivation can be attributed to the Security Council's silence regarding the authority for the Liberian operation? Is it, as one commentator suggests, recognition that a legitimate regional organization needs no authorization for this type of operation?²¹² If so, it seems to validate the position taken long ago by the U.S. during the Cuban missile crisis and the Dominican Republic operation.²¹³ Alternately, is the Security Council's reaction more than just "failure to condemn," but rather approval which can be fairly implied from the words of the resolutions?²¹⁴ Or is the Security Council's response merely a pragmatic recognition of a *fait accompli* while trying to avoid establishing precedent?²¹⁵

²¹¹ Besides resolutions 788 and 866, *see, e.g.*, S.C. Res. 813, U.N. SCOR, 48th Sess., 3187th mtg., U.N. Doc. S/RES/813 (1993) ("welcoming the continued commitment of" ECOWAS, and commending its efforts) and S.C. Res. 1100, U.N. SCOR, 52nd Sess., 3757th mtg., U.N. Doc. S/RES/1100 (1997) ("Noting with appreciation the active efforts of ECOWAS to restore peace, security, and stability to Liberia, and commending the States which have contributed to the ECOMOG.").

²¹² *See* Brown, *supra* note 148, at 258. The former Secretary General, Perez de Cuellar reportedly lent his unexpected support to this viewpoint, when in response to questions he said ECOWAS did not need the consent of the Security Council before intervening in Liberia. *See* Peter da Costa, *Peacekeepers Run to U.N. as Mediation Runs Out of Steam*, INTERPRESS SERVICE, Sept. 23, 1992, available in LEXIS, News Library, Inpres File.

²¹³ *See supra* note 172 and accompanying text. *See also* Wippman, *supra* note 148, at 187 (comparing the ECOWAS action which had at best "implicit" approval by the Security Council with the U.S. position during the Cuban missile crisis and Dominican Republic operation that "failure to condemn" is equivalent to authorization).

²¹⁴ The resolutions "recall" the provisions of Chapter VIII and refer to the ECOMOG as a peacekeeping force. *See supra* notes 207, 208, and 211. Professor Wippman argues that resolution 788, and the debates leading up to its adoption, reflect clear approval of the ECOWAS initiatives. The resolution also may reflect the Council's strong sense of relief that the group was willing to try and settle a protracted conflict at a time when the UN was "over-stretched." Wippman, *supra* note 148, at 173-74.

²¹⁵ *See* Ofodile, *supra* note 143, at 414 (endorsing the operation would have set a dangerous precedent, while condemning it would have contributed to further breakdown of law and order; asserting the reference to Chapter VIII in the resolutions merely recognizes ECOWAS' status as a regional organization).

The fact remains that for the first time a regional organization undertook a humanitarian intervention without express Security Council approval while avoiding international censure. When studied in light of the Grenada and Dominican adventures, the implication is that no prior Security Council authorization is necessary when other regional organizations, such as NATO, undertake humanitarian intervention under the proper circumstances. Given the demonstrated ineffectiveness of the UN, NATO will engage in humanitarian intervention in the future, perhaps without explicit Security Council approval. Therefore, it is imperative that NATO lay the legal foundation for its involvement in advance by making the necessary adjustments to the North Atlantic Treaty.

2. *The OAS in Haiti*--Haiti has a long history of military dictatorships, often punctuated by coups and counter-revolutions.²¹⁶ After vigorous negotiations by the OAS, the ruling junta permitted free elections to be held in December 1990. The OAS and the United Nations extensively monitored the elections.²¹⁷ In February 1991, Jean-Bertrand Aristide took office as one of the few democratically elected presidents in the history of Haiti. However, after only seven months, Aristide was deposed by another military coup.²¹⁸

²¹⁶ For a brief sketch of Haiti's tortured political background, see Domingo E. Acevedo, *The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 119, 123-128 (Lori Fisler Damrosch ed., 1993).

²¹⁷ *Id.* at 128-31. Aristide took 67 percent of the popular vote. *Id.* Additional details concerning the Aristide election are available in Felicia Swindells, *U.N. Sanctions in Haiti: A Contradiction Under Articles 41 and 55 of the U.N. Charter*, 20 FORDHAM INT'L L.J. 1878 (1997).

²¹⁸ The traditional Haitian power base backed the coup due to their fear of Aristide's reforms. The leader of the new junta, General Raoul Cedras, claimed that Aristide was persecuting the National Assembly and the armed forces. See generally Acevedo, *supra* note 216, at 131; Brown, *supra* note 148, at 259.

The OAS did not hesitate to become involved. Drawing on the strength of the Santiago Declaration,²¹⁹ the OAS Permanent Council issued a resolution condemning the coup, calling for immediate restoration of Aristide to power, and convening an ad hoc meeting of foreign ministers (the Ad Hoc Group).²²⁰ The OAS vigorously pursued sanctions against Haiti. The Ad Hoc Group issued a resolution reasserting the call for restoration of the Aristide government; announcing an embargo to effect a political, economic, and financial isolation of the Cedras regime; and implementing measures to monitor human rights.²²¹ When the regime immediately rejected its demands, the Ad Hoc Group announced that it would not recognize the de facto government, although it would send a civilian commission to negotiate.²²²

Although the OAS began to lobby the UN to have the Haitian matter placed on its docket almost immediately after the coup, the UN took little action.²²³ After the third OAS

²¹⁹ *Santiago Commitment to Democracy and the Renewal of the Inter-American System*, O.A.S. General Assembly, 3rd Plenary Sess., June 4, 1991, at 1, O.A.S. Doc. OEA/Ser.P/XXI.O.2 (1991) [hereinafter the Santiago Declaration]. In the Santiago Declaration the OAS expressed unequivocal support for representative democracy. The Declaration requires an immediate meeting of the Permanent Council whenever a democracy is irregularly removed. In turn, the Council must call for an ad hoc meeting of foreign ministers or of the OAS General Assembly which then must decide whether to take action consistent with the OAS Charter and the Charter of the United Nations.

²²⁰ *Resolution in Support of the Democratic Government of Haiti*, CP/RES.567 (870/91). Sept. 30, 1991.

²²¹ *Resolution in Support for the Democratic Government of Haiti*, MRE/RES. 1/91, doc. OEA/Ser.F/V.1, Oct. 3, 1991. With regard to Chapter VIII, article 54, the resolution also notified the UN of its actions.

²²² *Resolution in Support for the Democratic Government of Haiti*, MRE/RES. 2/91, Oct. 8, 1991.

²²³ See Brown, *supra* note 148, at 259. See also Arend, *supra* note 21, at 22-23 (noting a clash in philosophy between the OAS and the UN). Initially the UN did not put the item on its agenda because it considered it an internal matter mandating non-interference under Article 2(7). The OAS disagreed, arguing that it was a matter of collective self-defense and therefore a proper matter for international jurisdiction. *Id.*

resolution, the General Assembly passed a resolution in support of OAS actions and requested the world community to honor the embargo. Thereafter, the Haiti situation did not engage the UN's attention for almost two years.²²⁴

The OAS issued two more resolutions in 1992 in an attempt to strengthen its embargo.²²⁵ However, the embargo effort was weakened by several factors. First, the United States did not fully support the embargo.²²⁶ Second, the OAS Charter arguably does not permit the organization to impose its decisions on its members.²²⁷ A final problem is that, even if it could line up support amongst its members, it could not enforce the embargo against the rest of the world without UN support.

In 1993, possibly influenced by increased refugee flows, the U.S. once again threw its weight behind the OAS efforts before the UN. The Security Council recognized the "unique and exceptional circumstances" existing in Haiti and issued resolution 841 directing member states to comply with the OAS embargo and directing the Secretary General to establish a

²²⁴ G.A. Res. 46/7, U.N. GAOR, 46th Sess., Supp. 49, U.N. Doc. A/46/49 (1991).

²²⁵ *Restoration of Democracy in Haiti*, MRE/RES. 3/92, May 17, 1992 (calling for stronger measures and asking for UN support); and *Reinstatement of Democracy in Haiti*, MRE/RES. 4/92, Dec. 13, 1992 (issuing yet another call to the UN for a possible global embargo).

²²⁶ See Acevedo, *supra* note 216, at 137. In February 1992, U.S. policy shifted from strict enforcement of the embargo to permitting exemptions on a case by case basis. Economic losses by American companies and efforts to reduce the flow of refugees from Haiti were suspected as the reasons for the policy change. *Id.*

²²⁷ See OAS CHARTER, *supra* note 193. Article 18 says: "No State or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, or cultural elements." *Id.* Article 19 says: "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." *Id.*

working committee in conjunction with the OAS to monitor compliance and progress in Haiti.²²⁸ The UN appeared to try to limit the value of its resolution as precedent. Having found a “threat to international peace and security,” it took the unusual step of authorizing the Security Council President to release a statement emphasizing once again the “uniqueness” of the situation and its decision to act only after the efforts of the OAS and the General Assembly were unavailing.²²⁹

What were the “unique and exceptional” aspects to the Haiti crisis? Resolution 841 expresses concern about “mass displacements of population” and deplores the failure to “reinstate the legitimate government.”²³⁰ Yet, similar situations have occurred across the world in the past without the Security Council invoking Chapter VII authority. No further clarification was forthcoming from the Security Council. Shortly after Resolution 841, the de facto government signed the Governor’s Island Agreement²³¹ with Aristide. The agreement was designed to work towards peaceful turnover of power. Just as quickly, the Cedras regime reneged. Thereafter, the UN sanctions referred to the military government’s “failure

²²⁸ S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993). Adopted 16 June 93, it (1) referenced the OAS resolutions and GA resolutions calling for an embargo; (2) recalled Chapter VIII to stress the need for cooperation between the UN and the OAS in the matter; and (3) then acted under Chapter VII to impose the embargo consistent with that called for by OAS.

²²⁹ United Nations Security Council, Provisional Verbatim Record of the Three Thousand Two Hundred and Thirty-Eighth Meeting, U.N. Doc. S/PV.3238, 16 June 1993. For accounts of the events leading to the release of these documents, see Swindells, *supra* note 217, at 1916, and Perez, *supra* note 41, at 430-32.

²³⁰ See Resolution 841, *supra* note 228.

²³¹ *Governor’s Island Agreement*, in *Report of the Secretary General: The Situation of Democracy and Human Rights in Haiti*, S.C. Doc., 48th Sess., at 2-5, U.N. Doc. A/47/975-S/26063 (1993) [hereinafter *Governor’s Island Agreement*]. The agreement was supposed to allow Aristide’s choice as Prime Minister to assume his role as part of a ten step plan for restoring democracy to Haiti.

to fulfill their obligations under the agreement” as constituting “a threat to peace and security in the region.”²³²

Finally, exasperated by the de facto government’s intransigence, on July 31, 1994 the Security Council authorized a multinational force to use “all necessary means” to enforce the Governors Island Agreement. Other goals were to return the legitimate government to power, to establish and to maintain a secure and stable environment for implementation of the agreement, and to ensure the safety of a UN follow-on force.²³³ The basis for the Security Council’s decision was again the Governors Island Agreement, although concern for violations of civil liberties, and the plight of Haitian refugees caused the Council “grave concern.”²³⁴

Despite the attempted limitations in the Security Council’s resolutions, the fact is that for the first time the UN authorized use of force to change the government of a nation not at war with its neighbors. About thirty nations ranging from “Bangladesh to Bolivia” prepared to enforce the resolutions.²³⁵ By implication, they endorsed the concept of democratic

²³² See, e.g., S.C. Res. 873, U.N. SCOR, 48th Sess., 3291st mtg., U.N. Doc. S/RES/873 (1993) (reversing the Security Council’s decision ending the embargo rendered when it had looked like a political solution had been reached); S.C. Res. 875, U.N. SCOR, 48th Sess., 3293rd mtg., U.N. Doc. S/RES/875 (1993) (allowing stop and search of ships headed to Haiti).

²³³ S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., at 2, U.N. Doc. S/RES/940 (1994).

²³⁴ See *id.* preamble, para. 4.

²³⁵ The appeal for a multinational force was directed particularly to the states “in the region.” *Id.* para. 12. But, response to the appeal was much broader. See Brown, *supra* note 148, at 259; Perez, *supra* note 41, at 236.

intervention. Only the last minute abdication by the Cedras regime prevented the permissive use of force from occurring.²³⁶

The Haiti situation demonstrates that under the right circumstances the international community is prepared to support interventions based on democratic motives. This thesis argues that the democratic form of government is a condition precedent for joining NATO. History and the conditions within some of these states make it foreseeable that NATO may need to engage in democratic intervention in the future. Since these operations may occur without explicit Security Council approval, it is necessary that NATO lay the legal foundation for its involvement in advance by making the necessary adjustments to the North Atlantic Treaty.

IV. UN/NATO Cooperation in Bosnia: Charter-Based Regional Peace Operations

The inability of the UN to handle more robust peace operations was amply demonstrated in Bosnia and Somalia.²³⁷ In an effort to put more "teeth" in its arsenal, it has come to regard regional military alliances such as NATO as potential agents.²³⁸ In 1995, Kofi Annan, the future Secretary-General, predicted that the regional organizations would assume more of the peace operations role, but that the Security Council would maintain overall

²³⁶ The MNF entered Haiti unopposed in September 1994. Brown, *supra* note 148, at 259. Less than six months later the Security Council determined a secure and stable environment permitting entry of the UN Mission in Haiti (UNMIH) had been achieved and began planning to deploy 6,000 troops to keep the peace. S.C. Res. 975, U.N. SCOR, 50th Sess., 3496th mtg., U.N. Doc. S/RES/940 (1995).

²³⁷ See FM 100-23, *supra* note 2, at 6-12.

²³⁸ Kofi A. Annan, *UN Peacekeeping Operations and Cooperation with NATO*, in UN PEACE OPERATIONS 406 (Walter Gary Sharp, Sr. ed., 1995).

strategic command and control of the operation.²³⁹ He was half right. Within the year, NATO assumed complete command and control of the Bosnia mission. Although the UN “invited” NATO to assume the role, it had little choice in the matter since NATO had already negotiated the turnover with the factions within Bosnia.

NATO signaled the possibility of its assuming a peace operations role in June 1992 by issuing the Oslo Declaration.²⁴⁰ The declaration stated in pertinent part that the North Atlantic Council agreed “to support on a case by case basis in accordance with [its] own procedures, peacekeeping activities under the responsibility of the CSCE [hereinafter called OSCE to reflect its name change].”²⁴¹ The Alliance extended a similar offer to the UN in December 1992.²⁴² While all NATO members are also members of the UN and of the OSCE, the reverse is not true. When the Security Council, the OSCE, and NATO agree that a peace operation is appropriate, there is no conflict over authorization. The open question concerns

²³⁹ *Id.*

²⁴⁰ *Final Communiqué Issued by the North Atlantic Council in Ministerial Session*, NATO PRESS COMMUNIQUÉ M-NAC-1 (92) 51, June 4, 1992 [hereinafter Oslo Declaration].

²⁴¹ *Id.* para. 11. As previously noted, the Conference on Security and Cooperation in Europe (CSCE) has become the Organization for Peace and Cooperation in Europe (OSCE). The OSCE, which has also been referred to as “the Helsinki process,” was until recently little more than a forum for consultation for 55 countries across Europe and North America (“from Vancouver to Vladivostock” is the popular refrain). It allowed East-West discussion on issues other than military affairs. Like NATO, it sought a new role when the Soviet Union collapsed. Unlike NATO, OSCE transformed itself into a Chapter VIII regional organization formally linking itself to the UN system. As a recognized regional organization, it serves as a legal framework for peacekeeping operations. OSCE’s drawback is that it has no military forces of its own, so it “subcontracts” with the WEU, NATO, and the Commonwealth of Independent States (CIS). Jerzy M. Nowak, *The Organization for Security and Co-operation in Europe*, in CHALLENGES FOR THE NEW PEACEKEEPERS 122, 127 (Trevor Findlay ed., 1996). See also NORTH ATLANTIC TREATY ORGANIZATION, BI-MNC DIRECTIVE, NATO DOCTRINE FOR PEACE SUPPORT OPERATIONS, E-2 (11 Dec. 1995) (citing the Security Council and the OSCE as the only sources of authority for NATO peace operations).

²⁴² *Final Communiqué issued by the North Atlantic Council in Ministerial Session*, NATO PRESS COMMUNIQUÉ M-NAC-2 (92) 106, Dec. 17, 1992.

whether NATO has legal authority to conduct peace operations when it desires to act, but the OSCE and the Security Council do not give permission. This thesis addresses that issue in part V.

All parties did agree that NATO's Bosnia campaign was an important peace operation. Within days after the General Framework Agreement for Peace (GFAP) was signed, the Security Council issued resolution 1031, extending its mantle of international legitimacy to the initiative.²⁴³ In the two years since the agreement, NATO has accomplished what neither the UN nor other European security groups were able to manage -- an enforceable cease-fire between the warring parties which allows the parties to continue negotiating a political solution to the crisis.

Despite its success, NATO was not predestined to take the lead role in Bosnia. After the break up of the Soviet Union some writers forecast that a uniquely European institution such as the OSCE, the WEU, or the European Union (EU) would be the organization most likely to assume peacekeeping tasks in the European theater.²⁴⁴ France became a fervent

²⁴³ See *supra* note 7 and accompanying text.

²⁴⁴ See Stromseth, *supra* note 25, at 492. Without the benefit of hindsight, Professor Stromseth projected in 1991 that a "pan-European institution" might be a better option to keep the peace in Europe beyond the traditional NATO borders. She felt the NATO role should be narrowly focused as a "residual deterrent" for collective self-defense against a possible Soviet reformation. That would help avoid the inherent danger of rekindling Russian fears which NATO expansion was bound to arouse. *Id.* Professor Stromseth also felt allowing NATO "out of area" would infringe on the prerogatives of the Security Council. *Id.* at 497-98. Finally, she advocated WEU develop rapidly to become a pillar of both NATO and the European security structure -- a concept which would later be called "dual-hatting." *Id.* at 499. See also JOHN WOODLIFFE, *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER INTERNATIONAL LAW* 334 (1992) (asserting that the broad authority of WEU would allow the European Allies to exercise out of area jurisdiction than the more strictly defined North Atlantic Treaty would allow).

proponent of developing a European defense identity separate from NATO.²⁴⁵ The WEU was often its organization of choice.²⁴⁶ When hostilities broke out in Yugoslavia, France insisted that the situation was a European problem and that it should be solved by European means.²⁴⁷

It was partly for that reason that the European Union (EU) found itself alone in 1991 trying to resolve yet another Balkan War without UN or NATO assistance.²⁴⁸ Borrowing the authority of the OSCE,²⁴⁹ the EU tried to negotiate an end to the conflict. However, although

²⁴⁵ See WOODLIFFE, *supra* note 244, at 336. France complains that NATO competes inappropriately for new roles which one of the other European organizations is designed to fulfill now or for which it can develop to fill in the future. Rader, *supra* note 6, at 153. When NATO produced the first draft of its Doctrine for NATO Peace Support Operations, France complained that it did not address OSCE operations and stalled its implementation until the doctrine was redrafted. *Id.*

²⁴⁶ The Western European Union (WEU) was created in 1948, the year prior to NATO. Treaty for Collaboration In Economic, Social, and Cultural Matters and for Collective Self-Defense, March 17, 1948, 19 U.N.T.S. 51, as modified by Protocol Modifying and Completing the Treaty for Collaboration In Economic, Social, And Cultural Matters And For Collective Self-Defense, October 23, 1954, 211 U.N.T.S. 342 (also called the Brussels Treaty of 1948). After NATO was formed, the WEU folded its command structures into those of NATO. PAUL BORCIER, *THE ASSEMBLY OF WESTERN EUROPEAN UNION* 13-14 (1975). Its members resuscitated it in 1984 with a view to creating a "more cohesive European security and defense identity." WOODLIFFE, *supra* note 244, at 333. Its main operational achievements prior to the Yugoslavian conflicts were providing escort for oil tankers in the Persian Gulf during the Iran-Iraq War, and projecting a naval force into the area during the Persian Gulf War. *Id.* See also Stromseth, *supra* note 25, at 495-496. This meager experience did not prepare the WEU when in 1992 it answered the Security Council's request for member states to enforce the embargo against the warring Yugoslavian republics. It attempted, with limited success, to "operationalize" its activities by adding a planning staff and identifying European forces available for its missions. See Steinberg, *supra* note 26, at 58. The WEU was confirmed as the sole European institution competent to wield operational forces by the Treaty on European Union, February 7, 1992, reprinted in 31 I.L.M. 253 (1992) (also called the Maastricht Treaty). NATO announced it would aid the effort by allowing the WEU to use its assets and non-American commanders. See Brown, *supra* note 148, at 277.

²⁴⁷ Richard M. Connaughton, *European Organizations and Intervention, in PEACE SUPPORT OPERATIONS AND THE U.S. MILITARY* 193 (Dennis J. Quinn ed., 1994).

²⁴⁸ The Security Council initially regarded the Yugoslavian conflict an internal affair. It still regarded article 2(7) as a bar to getting involved in the situation. Steinberg, *supra* note 26, at 38. The Council did agree to impose an arms embargo on Yugoslavia after repeated EU requests. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991).

²⁴⁹ Yugoslavia was not a member of the EU, but it was a member of the OSCE. Therefore, EU selected member states who were a member of both organizations to act as mediators. The idea was that the OSCE "provided the

it arranged a brief cease-fire in September 1991, the EU's inability to develop a credible WEU peacekeeping force doomed the effort.²⁵⁰

When it became apparent that the European effort was failing, the Security Council finally agreed to establish the UN Protection Force (UNPROFOR), contingent on the parties establishing another cease-fire.²⁵¹ That was achieved in January 1992, and the first phase of the Yugoslavian conflict drew to a close. It became clear that the forces were disengaging in Slovenia and in much of Croatia. Unfortunately, the Bosnia situation rapidly deteriorated.²⁵² After the factions killed several EU monitors, the UN devised forceful measures to secure the Sarajevo airport and to protect humanitarian relief programs.²⁵³

Shortly after the Oslo Declaration in June 1992, NATO began monitoring shipping traffic in the Adriatic Sea, and then shifted to active enforcement of the arms embargo imposed by resolution 713. At first, NATO worked in conjunction with the WEU, but command relationships grew increasingly complex as the operation went along. Eventually,

jurisdictional framework while the [EU] provided a credible threat of economic sanctions." Borgen, *supra* note 25, at 809.

²⁵⁰ See Steinberg, *supra* note 26, at 38. Despite French optimism, its WEU partners proved unwilling to insert ground troops without U.S. support. *Id.* at 60-61. Gaps in the European approach to security outside of NATO were again revealed during the recent crisis concerning Iraq. The EU was unable to develop a combined strategic approach to the crisis. Britain backed the U.S. initiative; France did not. Most other EU nations were along the political spectrum in between. As soon as the crisis appeared in abatement the members verbally attacked Britain, which presently has the rotating EU presidency, for actions inconsistent with the European agenda. Charles Trueheart, *Europe Brought Many Sides to Dispute*, WASH. POST, Feb. 27, 1998, at A29.

²⁵¹ S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg., U.N. Doc. S/RES/743 (1992).

²⁵² See Steinberg, *supra* note 26, at 40-41.

²⁵³ S.C. Res. 752, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/RES/752 (1992).

the two organizations merged into a single chain of command (Operation Sharp Guard), which was essentially the NATO chain of command.²⁵⁴

In the air, command relationships were just as confusing. In a short period of time, NATO went from monitoring flights in the Security Council proclaimed no-fly zone²⁵⁵ to actively enforcing the no-fly zone²⁵⁶ to providing close air support to protect UNPROFOR personnel²⁵⁷ and eventually using force to protect the so-called safe areas.²⁵⁸ Command and control of these operations required a cumbersome "dual key" procedure. It worked in this manner: the UN ground commander made a request for air support to the Secretary General; the Secretary General called the NATO Commander, Allied Forces in Southern Europe (CINCSOUTH) with his request; CINCSOUTH then called the strike forces located at Aviano Air Base, Italy, to authorize the strike.²⁵⁹

²⁵⁴ See Rader, *supra* note 6, at 142.

²⁵⁵ S.C. Res. 781, UN SCOR, 47th Sess., 3122nd mtg., U.N. Doc. S/RES/781 (1992).

²⁵⁶ S.C. Res. 816, UN SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/816 (1993)

²⁵⁷ See NATO FACTSHEET NO. 4, *supra* note 4, at 3. Soon after this authorization was granted the Serbian militia took several hundred UNPROFOR members hostage to protect themselves from the air-strikes. This illustrates an undesired side effect of "robust" peacekeeping -- and validates the U.S. position in the Dominican Republic that two international organizations ought not be in the same place trying to do the same job at the same time. See *supra* note 174 and the accompanying text. See also Rader, *supra* note 6, at 149 (noting the hostages were in the unusual circumstance of being caught between their peacekeeping duties and another organizations "peace" mission).

²⁵⁸ S.C. Res. 836, UN SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993).

²⁵⁹ See NATO FACTSHEET NO. 4, *supra* note 4, at 4. See also Kaye, *supra* note 94, at 439 (arguing that the U.S. President unconstitutionally relinquished his strategic command authority over U.S. troops and policy objectives in this instance).

Despite these drawbacks, the cumulative weight of the NATO air campaign forced the parties to the negotiating table. The General Framework Agreement was initialed in Dayton, Ohio, in November 1995. The UN was a minor player in the GFAP, which was essentially brokered by NATO. Although the Security Council was "invited" to approve the deal, there seems little doubt that NATO would have proceeded even without the Council's approval. Nevertheless, the Security Council approved the agreement in Resolution 1031.²⁶⁰ Resolution 1031 contained several unprecedented provisions. Besides handing over peacekeeping duties from the UN to a regional organization, it admonished the multinational force to respect the NATO chain of command and authorized NATO to "take all necessary measures" to achieve the humanitarian goals of the mission.²⁶¹

The NATO peace operation in Bosnia featured the first time a failed UN peacekeeping force handed off its responsibilities to a regional organization. The mission is an object lesson in how a combined force, honed by years of joint training, succeeded where an ad hoc coalition, the kind typically employed by the UN, did not. The Implementation Force (IFOR) made sure it provided its components with technologically superior equipment and logistics, directed by a well-integrated command and control structure, and with a clear

²⁶⁰ See *supra* note 7 and accompanying text.

²⁶¹ *Id.* A later extension of NATO's mandate was approved as a matter of course. See S.C. Res. 1088, UN SCOR, 51st Sess., 3723rd mtg., U.N. Doc. S/RES/1088 (1996). As of the date this paper was completed, the Alliance planned to extend the mission into the foreseeable future. See *NATO to Extend Bosnia Force's Stay Past June*, WASH. POST, Feb. 19, 1998, at A24. Whatever form a follow-on force takes, the European allies have made it clear that their own commitment to Bosnia depends on the continued presence of American forces. See William Drozdiak, *NATO Ministers Agree Force Must Stay in Bosnia*, WASH. POST, Oct. 2, 1997, at A19 (detailing decision of North Atlantic ministers to stay beyond June 1998 -- as long as U.S. leadership and ground troops remain engaged).

mandate to use force to effectuate its mission.²⁶² This level of support cannot be duplicated by the typical UN-directed peacekeeping operation.

Despite the success of the mission, the legal basis for the operation is somewhat controversial. Although NATO's presence is authorized by a Security Council resolution promulgated under Chapter VII, NATO's own charter, the North Atlantic Treaty, does not address peacekeeping at all. Unlike the OSCE, the Alliance has no formal status with the UN as a Chapter VIII regional organization. NATO attempts to paper over this deficiency by borrowing its legitimacy from the OSCE. This position places the Alliance in direct opposition to the stance that it has taken for over forty years that it is simply a collective security organization. It also ignores the reason it has maintained that position: the desire to avoid limitations on its freedom of action.

Ultimately, the Bosnia action may be regarded as an anomaly. Its legal basis can be explained in terms of Security Council authorization, combined with host state consent. International pressure for action to stop the brutal human rights violations displayed daily through the electronic media probably had an impact as well. Meanwhile, NATO was an organization searching for a mission following the collapse of the Soviet Union. The OSCE became a convenient forum to leverage the organization into the conflict without needing to examine closely or directly refute the historical justifications for the Alliance.

²⁶² See GFAP, *supra* note 7.

However, the need for NATO involvement in future "Bosnias" may not generate the same pan-European consensus needed to support an OSCE action. The European Union's ineffectiveness in Bosnia and its recent rejection of Turkey as a candidate member also shows that it is not prepared to assume any important security role.²⁶³ Additionally, it has already been demonstrated that Security Council stalemate still occurs despite the end of the Cold War. NATO must be prepared to act pursuant to its own charter to address vital European security concerns without fostering its legitimacy from some other international organization.

With those propositions in mind, a number of valid questions remain unanswered. For example: (1) What if NATO members agree that Bosnia, or some other place like it, poses a threat to international peace and security, but neither the Security Council nor the OSCE is willing to authorize a peace operation? (2) Does NATO have the requisite legal right to act under its Charter and international law? (3) What if the state in question refuses permission for NATO to act despite widespread violations of human rights? (4) What if the

²⁶³ Apparently Turkey's status as the most important anchor on NATO's southern flank carries little weight with the EU. At its December 1997 summit the EU rejected Turkey's membership request placing the blame on purported human rights abuses. At the same time, it welcomed talks with six potential members who were until recently mortal enemies of Western Europe, and opened discussions with five others. *European Union Slams Door on Turkey*, ASSOCIATED PRESS, Dec. 13, 1997, available in 1997 WL 13312413. Turkey, angry over its rejection after working for membership for over ten years, accused the EU of erecting "a new cultural Berlin wall." Lee Hockstader and Kelly Couturier, *Turkey Severs Ties with EU After Membership Snub*, LA TIMES, Dec. 15, 1997, available in 1997 WL 13145360. Reportedly, the Turks hinted that EU's action could damage negotiations for a settlement in Cyprus. Rubbing salt into the wound, the EU opened discussions with Cyprus, and countries with a reputation for economic and political turmoil, such as Slovakia and Bulgaria. *Id.* See also Ben Barber, *Turkey Threatens Partition of Cyprus*, WASH. TIMES, Dec. 19, 1997, at A17 (reporting the EU rejection was based on a poor human rights record, continuing conflict with Greece over Cyprus, and economic difficulties within Turkey; Turkey accused some members, Germany in particular, of being culturally biased against Turkey and seeking to restrict flow of Turkish workers into Germany; EU members permit free movement between their nations).

state is unable to consent because of collapse of its government or is unwilling to consent because the de facto government forcibly unseated a representative democracy? This thesis argues that NATO should amend its charter to take advantage of existing international law which would permit it to address these questions in a positive and legitimate fashion.

V. Why NATO Should Amend Its Charter

NATO should amend the North Atlantic Treaty to preserve its freedom of action, to clarify the duties and responsibilities of its members which have been subject to drift and uncertainty since the dissolution of the Soviet Union, and to establish a clear legal basis for actions it will prosecute without the express permission of either the UN or the OSCE.

A. *Preserving NATO's Freedom of Action*

1. *The Legal Framework for Regional Organizations*--NATO should discard the legal fiction that it is not a Chapter VIII regional organization. The drafters of the UN Charter deliberately left the exact meaning of "regional arrangement" unclear.²⁶⁴ However, some basic concepts have been identified. In practice, the interpretation appears to include states that are more or less geographically co-located, and within that group of states the members agree to a charter which governs their relationships to some extent.²⁶⁵ Of course, NATO

²⁶⁴ See GOODRICH & HAMBRO, *supra* note 127, at 310-11. A proposal by the Egyptian delegation was rejected because it was feared that in some unforeseen fashion the definition might be too narrow. *Id.*

²⁶⁵ See Wippman, *supra* note 148, at 183-84. For a view that regional organizations can be more certainly defined, see Ofodile, *supra* note 143, at 410. The writer offers three factors: (1) there is a standing agreement between a subset of member states of the UN; (2) the agreement specifically deals with matters of international peace and security; and (3) the group has a direct relation to the region. *Id.* But see Borgen, *supra* note 25, at

easily clears these hurdles, sharing as it does a common set of interests under the auspices of the North Atlantic Treaty. Yet, NATO has historically sought to avoid being classified as a Chapter VIII organization.

The definition was debated extensively during the drafting of the North Atlantic Charter, but the members could not agree whether or not the Alliance constituted a regional arrangement. They felt that the issue was significant because Article 53 obliged regional organizations to obtain Security Council authorization before engaging in "enforcement actions."²⁶⁶ Apparently, the members believed that if they identified themselves as a regional organization they risked limiting their freedom of action. They reached this conclusion because a veto by a permanent member of the Security Council, presumably the Soviet Union, would block their ability to operate.²⁶⁷ In the end, the drafters omitted any reference to Chapter VIII.

However, in light of the development of international law since Chapter VIII was drafted, NATO's fictional status has little practical consequence. For instance, if NATO acts in self-defense, its operations are protected by Article 51, regardless of Security Council

799 (describing the scant requirements as self-identification and the willingness of member states to perceive the group as a regional organization).

²⁶⁶ See Stromseth, *supra* note 25, at 482. See also Meyer, *supra* note 25, at 423-24 (asserting long-held position of NATO that it was created under the auspices of Article 51 and therefore solely concerned with collective self-defense).

²⁶⁷ See Henrikson, *supra* note 13, at 42 ("All of these agreements for common self-defense refer to Article 51, and thus can be said to avoid the constraints on 'regional arrangements or agencies' of Chapter VIII, and perhaps even the more general limitations imposed by the Charter on the resort to force by U.N. members

approval. Moreover, the development of Article 52 demonstrates that consent-based peacekeeping is permissible with or without Security Council approval. Further, the UN's own campaigns have set the parameters for non-traditional peacekeeping short of enforcement action. Acting consistently with the "purposes and principles" of the Charter, precedent indicates that the community of nations is prepared to accept "altruistic collective" peace operations based on humanitarian concepts ranging from genocide to collapse of civil order.²⁶⁸

Ironically, under its present concept of peace operations, NATO subjects itself to the very oversight it sought to avoid during the Cold War. Russia wields veto power in both the Security Council and the OSCE. Yet, its present stance only allows NATO to pursue peace operations at the behest of one or more of those organizations. This effectively reduces the Alliance to little more than a subcontractor in peace operations.

Of course, the argument could be made that NATO preserved its independence by limiting its involvement to those it undertakes "on a case by case basis in accordance with its own policies and procedures."²⁶⁹ If so, this is a curious sort of freedom where the Alliance grants another organization the right to choose what peace operation it will or will not pursue

viewing their own and their allies' vital interests." See also Borgen, *supra* note 25, at 797 (stating regionals intentionally sought to describe themselves as Article 51 collectives in order to avoid oversight by the UN).

²⁶⁸ See Damrosch, *supra* note 146, at 12 (identifying the situations where approval most likely will occur as: genocide, interruption of delivery of humanitarian relief, violations of cease-fire agreements, collapse of civil order, and irregular interruption of democratic governance).

²⁶⁹ See Oslo Declaration, *supra* note 240.

in exchange for the right to decline to perform the operation. It is more rational for the NATO members to amend their charter to allow them to perform the peace operations which international law allows without UN (or Russian) oversight.

2. *The Russians Are Not Coming: They Are Already Here*--The current concept of NATO peace operations subjects the Alliance to supervision by the Russian government. If NATO pursues a mission under the auspices of the UN, Russia's veto on the Security Council can block operations proposed by the Alliance. Furthermore, if NATO chooses to request authority from the OSCE, Russia also has an effective veto in that forum.²⁷⁰ The result is that the Alliance completely loses its freedom of action without a separate basis for peace operations in its own charter.

The threat of a Russian veto over NATO peace operations is not chimerical. For example, in 1995, Russia demanded a role in the Bosnia peacekeeping process and threatened to withdraw from the Partnership for Peace if its call was ignored.²⁷¹ Once inside the coalition, Russia used the presence of its 1400 troops as a bargaining chip for concessions in

²⁷⁰ In theory the OSCE has a "consensus minus one" decision-making model, therefore Russia could not alone block an action favored by the rest of the organization. The reality is that the 52 member OSCE is too unwieldy to be a reliable forum for collective action since any dissent by a strong voice such as Russia's is likely to sway other members to vote against a proposed action. See Steinberg, *supra* note 26, at 61.

²⁷¹ Mikhail A. Alexseev, *Russia's "Cold Peace" Consensus: Transcending the Presidential Election*, 21 SPG FLETCHER F. WORLD AFF. 33, 39 (1997). This was not the first time Russia used the PFP to put pressure on the Allies. Aware that the West was anxious to have its participation, Russia at first declined to join, then later insisted on "special member" status as a condition for its participation. *Id.*

the way the mission was prosecuted.²⁷² This approach by the Russian government is consistent with its broader long-range goal to strengthen the OSCE at the expense of the North Atlantic Alliance,²⁷³ a position it appears to have achieved with the enshrinement of the principle of OSCE supremacy in the Founding Act.²⁷⁴

It should come as no surprise that Russia's political interests are not necessarily congruent with those of the Alliance. As it struggles to reform itself, Russia seeks to maintain the illusion that it is still a superpower nation, even though it no longer has the means with which to preserve that status.²⁷⁵ Its relationship with the West remains very unstable while it deals with the fundamental questions about its future.²⁷⁶ The problem most likely to cause friction with the Alliance is Russia's pursuit of hegemony over the hinterlands

²⁷² In September 1997, NATO considered bombing a Serbian-controlled radio station, which was broadcasting anti-NATO rhetoric. Russia warned that the action would be "an intolerable use of force" that might endanger the peacekeeping mission. *U.S. Dispatches 3 Planes to Bosnia to Jam Serbs' Anti-NATO Broadcasts*, STAR-TRIB. (Minneapolis-St. Paul), Sept. 12, 1997, at 12A. The threat came during the first organizational meeting held in Brussels designed to establish the NATO-Russia Permanent Joint Council (PJC). The reported comment of "a senior NATO diplomat" was that, "It turned out to be a very disagreeable meeting. There was (sic) a lot of complaints around the table. This was not a good omen for the future work of the NATO-Russia council." William Drozdiak, *Moscow Warns NATO on Bosnia*, WASH. POST, Sept. 12, 1997, at A27.

²⁷³ Oskaras Jusys & Kaestutis Sadauskas, *Why, How, Who, and When: A Lithuanian Perspective on NATO Enlargement*, 20 FORDHAM INT'L L.J. 1636, 1658-59 (1997).

²⁷⁴ See FOUNDING ACT, *supra* note 43, at 2-3 (declaring the OSCE the only pan-European security organization; committing the parties to choosing it to avoid "dividing lines or spheres of influence;" and acknowledging the OSCE as the "inclusive and comprehensive organization for consultation, decision-making and cooperation in its area and as a regional arrangement under Chapter VIII of the UN Charter").

²⁷⁵ See generally, Sherman Garnett, *Russia's Illusory Ambitions*, 76 FOREIGN AFF. 61, Mar. 1997.

²⁷⁶ Unsettled questions include whether Russia will continue as a fledgling democracy or lapse back into its traditional authoritarianism, and whether private enterprise will triumph over the command economy. See Richard Pipes, *Is Russia Still the Enemy?*, 76 FOREIGN AFF. 65, Sept. 1997, available in 1997 WL 9287483. Despite progress the Duma, Russia's parliament, is still in communist hands. The popular base for democracy is also "thin and brittle." Many people responding to a poll before the 1996 Presidential elections felt they were better off under the old Soviet-style government. Observers note that the professional military officers corps is "embittered and vindictive" over the loss of Russia's military power. Moreover, there is only nominal civilian control over the military with only one civilian executive appointed to the Ministry of Defense. *Id.*

it lost during the break up of the Soviet Union. Immediately after the fall of the USSR, Russia sought to reassert control by forming the Commonwealth of Independent States (CIS).²⁷⁷ While the policy achieved some short term success, it also multiplies opportunity for competition with the West. This occurs because several of the republics have developed important economic and political ties outside Russia's "near abroad" while accommodating Russian military presence within their borders.²⁷⁸

Meanwhile, NATO enlargement pushes the Alliance to the borders of the Ukraine and the Russian province of Kaliningrad, a small enclave on the coast of the Baltic Sea between Poland and Lithuania. Russia fought the idea of NATO enlargement every step of the way, hoping to disband the Alliance or at least to wring concessions with its grudging cooperation.²⁷⁹ Reportedly, a "White Book" released in late 1995 by Russia's intelligence

²⁷⁷ See *id.* (claiming the CIS mutual security treaty effectively entrusted security of all signatories to the Russian army); see also Alexseev, *supra* note 271, at 40, 46 (asserting that the tempo to reintegrate the lost republics increased after the 1996 Presidential election despite the claims of some observers that the call for confederation was merely election year rhetoric, and that "Moscow's strategy is ... to integrate the former Soviet republics into a Russia-led collective security system and increase Russia's sharing of their natural resources."); Garnett, *supra* note 275, at 66 (noting CIS integration remains a key element in Russia's claims to great power status). Some former republics voluntarily joined the organization, while others were coerced. After Georgia refused membership, Russia actively fomented a rebellion in the Abkhazia region. When Georgia was unable to handle the situation without Russian help, Russia negotiated an agreement allowing it to station 15,000 troops on Georgian soil in addition to the "peacekeeping" mission it sent to the Abkhazia region. As soon as Georgia allowed the force in the "rebellion" abated. See Pipes, *supra* note 276.

²⁷⁸ See Garnett, *supra* note 275, at 70-73. In September 1997 Russia had troops deployed in all the ex-Soviet republics with the exception of the Baltic states and Azerbaijan. See Pipes, *supra* note 276. Although the conflict may be some time away, observers perceive a "geopolitical fault line" opening up in Russia's south along the Caspian Sea and Central Asia. The area is likely to receive increased attention from the West due to its geopolitical importance and the presence of copious amounts of oil. For a discussion of the economic and military impact of the area, see *supra* note 33 and the accompanying text.

²⁷⁹ See Alexseev, *supra* note 271, at 33-34 (describing the Russian practice of realpolitik). According to Alexseev, the Russian perspective is that the world of geopolitics is a zero-sum game where a gain by the West is a loss to the Russians. He believes the approach will not soon change because it is accepted throughout the Russian system from the politicians to the intelligence services to the public. *Id.* at 33-37.

services advocated this strategy.²⁸⁰ Examples of the policy are abundant. As bribes for its cooperation in recent years, Russia bargained for a seat on the G-7 economic summit by threatening not to participate in the Partnership for Peace (PFP).²⁸¹ It stalled ratification in the Duma of START II, the second stage of nuclear arms reduction, unless the West agrees to pay for it.²⁸² Russia also threatened to withdraw from the Conventional Forces in Europe Treaty (CFE) unless it was permitted to increase troop levels north of the Caucasus.²⁸³ A major concession sought by Russia is to increase its role in the European decision-making process.²⁸⁴

The Permanent Joint Council (PJC) resulted from Russian pressure against the enlargement process. The PJC allows Russia to bypass the OSCE and the Euro-Atlantic Partnership Council (EAPC) and come directly to the table with NATO without the presence

²⁸⁰ *Id.* at 37. The potential influence of this philosophy is supported by the fact that one of its sponsors was Yevgeny Primakov, then the head of Russia's Foreign Intelligence Service, now the Russian Foreign Minister. *Id.* at 38.

²⁸¹ *Id.* at 39.

²⁸² *Id.* See also Jusys & Sadauskas, *supra* note 273, at 1663 (admitting that the START delay may be blamed more on the technical and financial difficulties encountered by the Russians as they seek to destroy the outlawed multiple warheads, while producing single warhead missiles, but noting, "The possibility of hearing new excuses, however, should not be ruled out.").

²⁸³ See Alexseev, *supra* note 271, at 39-40. See also Jusys & Sadauskas, *supra* note 273, at 1662-63 (describing the bargain bitterly as a "needless one way concession" conducted in secrecy without the participation of non-CFE members affected by it).

²⁸⁴ See Alexseev, *supra* note 271, at 46. Russia's other purported goals are to seek to balance Western influence in Asia and Middle East, and to intensify its efforts to dominate the CIS. *Id.* Former Russian general and defense minister (and probable future Presidential candidate), Alexander Lebed, reportedly stated that "greater interaction with NATO gives Moscow a chance to influence and exploit significant differences among NATO member-states, thus undermining NATO from within." *Id.* at 45.

of the other PFP members or even the NATO membership candidates.²⁸⁵ The agreement purports to blunt any negative consequences to this arrangement by stating that consultations will be conducted “with respect to security issues of common concern,” but that such consultations “will not extend to internal matters of either NATO, NATO member states, or Russia.”²⁸⁶ Additionally, it states, “Provisions of this Act do not provide NATO or Russia, in any way, with a right of veto over the actions of the other nor do they infringe upon or restrict the rights of NATO or Russia to independent decision-making and action.”²⁸⁷

Nevertheless, observers are skeptical of NATO’s ability to keep Russia out of its internal affairs.²⁸⁸ The initial PJC meetings demonstrate that there is validity to those observations. Russia used the very first ministerial meeting to demand that it be included in future Alliance decisions concerning action in Bosnia.²⁸⁹ Subsequent meetings established the tone where NATO members insist that certain matters are not “security issues of common

²⁸⁵ See Jusys & Sadauskas, *supra* note 273, at 1659-61. One of the possible consequences of the PJC arrangement is that it allows Russia to participate in the NATO decision-making process for almost a year and a half before the next round of negotiations for NATO membership. See generally FOUNDING ACT, *supra* note 43.

²⁸⁶ See FOUNDING ACT, *supra* note 43, at 4.

²⁸⁷ *Id.* at 5.

²⁸⁸ See, e.g., Martin Sieff, *First NATO-Russia Meeting Expected to Go Smoothly*, WASH. TIMES, Sept. 26, 1997, at A13 (quoting Peter Rodman, director of national security studies at the Nixon Center for Peace and Freedom, “[T]he existence of the Permanent Joint Council will make it a lot more difficult to keep Russia out of the room when NATO members are hammering out their decisions.”); Tom Carter, *Kissinger Criticizes NATO-Russia Deal*, WASH. TIMES, Oct. 31, 1997, at A15 (quoting Henry Kissinger, former Secretary of State, that the act means “de facto membership”); Pipes, *supra* note 276, at 65 (“Russia has been given a seat on the Alliance’s Permanent Joint Council, which assures it, if not of a veto, then of a voice, in NATO deliberations.”); see also Will, *supra* note 43.

²⁸⁹ Laura Silber & David Buchan, *Moscow Demands a Say Over Bosnia*, FIN. TIMES (London), Sept. 27, 1997, at 2.

concern,” but where the Russians assert the contrary view.²⁹⁰ What is certain is that the PJC gives Russia “a voice if not a veto” on peace operations matters. The Founding Act specifically identifies peacekeeping operations as an area of mutual interest.²⁹¹

The inference is that NATO has managed to box itself into a corner when it considers peace operations. If peace operations are, as some contend, a natural outgrowth of Article 5, these missions are an internal matter for NATO policy-making alone. Yet, the Founding Act justifies the opposite conclusion that peace operations are subject to the independent review of both the OSCE and the Russian government. The very brief history of the PJC indicates that the Russian government will be quite active in asserting its views at all forums available to it. This dilemma cannot be resolved without a clear declaration in the North Atlantic Treaty that peace operations are an integral responsibility of NATO.

B. The Treaty as Charter for NATO's Mission

When the NATO heads of state meet in April 1999 for the fiftieth anniversary summit, instead of proclaiming what is bound to be another short-term change in the Strategic Concept, they should seize the opportunity to amend the North Atlantic Treaty.

²⁹⁰ The Founding Act established a three member panel to set the agenda and chair the meetings. The three members are a Russian delegate, the NATO Secretary-General, and another NATO member representative which rotates monthly. See FOUNDING ACT, *supra* note 43, at 5. The result of this arrangement has reportedly, “proved to be a formula for virtual paralysis.” NATO members express fear that Russia seeks to use the agenda to undermine the organization’s policy-making. William Drozdiak, *West, Russia Vow Closer Cooperation*, WASH. POST, Dec. 4, 1997, at A40. On their behalf, the Russians warn that if they are not allowed a “genuine voice” in the PJC, its utility is limited. James Morrison, *Lukin on the Line*, WASH. TIMES, Feb. 24, 1998, at A16.

²⁹¹ See FOUNDING ACT, *supra* note 43, at 6.

Since the collapse of the Soviet Union, NATO has been an organization in search of a mission. The result has been a change in strategic direction every few years as the European situation evolves. As revolution swept Europe in 1990 and set the Warsaw Pact countries and Soviet satellite republics free, NATO called a summit in London and prepared to offer a hand of friendship to its erstwhile enemies.²⁹² The Alliance announced its determination to enhance its political component consistent with Article 2,²⁹³ but also emphasized its primary mission to remain a purely defensive alliance.²⁹⁴

The following year, NATO issued a declaration identifying its four fundamental tasks:²⁹⁵ (1) to provide a foundation for a stable environment in Europe based on the growth of democratic institutions; (2) to serve as a forum for Allied consultations and for “appropriate coordination of their efforts in fields of common concern;” (3) to deter and to defend against any threat of aggression against the territory of any NATO member state; and (4) to preserve the strategic balance in Europe.²⁹⁶ Once again, the primary focus remained on collective self-defense.

²⁹² NATO Communiqué, *London Declaration on a Transformed North Atlantic Alliance*, July 8, 1990 (visited Feb. 4, 1998) <<http://www.nato.int/docu/comm/c900706a.htm>> [hereinafter *London Declaration*]. The prime concern of the day was ensuring the conventional arms talks continued forward despite the upheavals. The other major provisions called for establishing regular diplomatic liaison with Warsaw Pact members, and negotiating a declaration that the two organizations were “no longer adversaries.” *Id.*

²⁹³ See North Atlantic Treaty, *supra* note 1. “The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being ...” *Id.* art 2.

²⁹⁴ See *London Declaration*, *supra* note 292.

²⁹⁵ NATO Communiqué, *NATO's Core Security Functions in the New Europe*, June 7, 1991 (visited Feb. 4, 1998) <<http://www.nato.int/docu/comm/c910607b.htm>>.

²⁹⁶ *Id.* para. 6.

In November 1991, the Alliance announced its first new strategic concept since 1967.²⁹⁷ The new Strategic Concept reflected the collapse of the Warsaw Pact and recognized that the greatest threat to NATO was no longer a full-scale attack across the entire European front.²⁹⁸ Instead, risks were more likely to occur from spill-over from outside of the borders of NATO members.²⁹⁹ Nevertheless, it reconfirmed the “core purposes”³⁰⁰ and stated that “the maintenance of an adequate military capability and clear preparedness to act collectively in the common defense remain central to the Alliance’s security objectives.”³⁰¹ To the extent that it addressed a role for NATO in peacekeeping at all, it foresaw the Allies being called upon to provide forces for UN missions,³⁰² but the implication was that NATO members would supply forces as individual nations rather than as a regional organization. The Alliance still considered the main threat, although admittedly a reduced one, to consist of the Soviet conventional and nuclear forces.³⁰³

²⁹⁷ See Simon, *supra* note 30, at 51. The new strategy called for a changed and smaller force structure to be maintained at lower levels of readiness. It focused on reducing nuclear arms and established the North Atlantic Cooperative Council to act as a liaison between NATO and the Central and Eastern European nations. See generally *The Alliance’s New Strategic Concept*, *supra* note 28.

²⁹⁸ See *The Alliance’s New Strategic Concept*, *supra* note 28, para. 7.

²⁹⁹ *Id.* para. 9.

³⁰⁰ *Id.* para. 20.

³⁰¹ *Id.* para. 30. This principle is repeated throughout the document. See, e.g., *id.* para. 35 (“The Alliance is purely defensive in purpose: none of its weapons will ever be used except in self-defense ...”); para. 53 (addressing a force restructuring plan permitting integrated multinational forces to replace national blocks in the planning of collective defense).

³⁰² *Id.* para. 41.

³⁰³ *Id.* paras. 13, 14.

The collapse of the Soviet Union occurred only one month later. Suddenly, the single mission, which had justified NATO for over forty years was not merely diminished, it had virtually ceased to exist. It was against this background that NATO announced its decisions in June and December 1992 to support peacekeeping efforts by the OSCE and the UN, respectively.³⁰⁴ In other words, in less than a year after it released its new Strategic Concept which mentioned nothing about NATO peace operations, NATO was seeking a new mission beyond its charter by offering its services to the OSCE.

The Partnership for Peace initiative and announcement of plans to expand NATO soon followed at the Brussels Summit in December 1994.³⁰⁵ NATO perceived peacekeeping as the function best suited for cooperation between itself and the PFP members. To some extent, the PFP countries may have believed that their candidacy for NATO membership depended on their willingness to undertake peacekeeping duties in conjunction with the Alliance.³⁰⁶ Peacekeeping had become less the focus of NATO than a contest to determine the worthiness of the candidates. The real focus in the years since the Brussels summit has

³⁰⁴ See *supra* notes 240, 242 and accompanying text.

³⁰⁵ *Declaration of the Heads of State and Government Issued by the North Atlantic Council in Brussels, Belgium*, NATO PRESS COMMUNIQUÉ M-NAC-1 (94) 3, Jan. 11, 1994. The communiqué announced the additional plans to develop the European Security and Defense Identity (ESDI), and to strengthen the WEU. Although NATO made no promises to the PFP nations that they would become NATO members, it certainly opened the door to the possibility. The possibility was confirmed later that year when NATO announced it "remains open to membership ... and would welcome NATO enlargement ..." *Final Communiqué of the North Atlantic Council in Ministerial Session*, NATO PRESS COMMUNIQUÉ M-NAC-2 (94) 116, Jan. 11, 1994, at 3.

³⁰⁶ See Simon, *supra* note 30, at 52.

been on internal reorganization and political developments, while paying lip service to “fundamental purpose of collective self-defense.”³⁰⁷

Finally, the Alliance recognized that the Strategic Concept it had developed so recently was already obsolete. At the Madrid meeting in July 1997, NATO announced that it would reexamine the concept “to ensure that it is fully consistent with Europe’s new security situation,” with an eye towards revising the Strategic Concept at the April 1999 summit -- the fiftieth anniversary of the Alliance.³⁰⁸ The aim is to “confirm [NATO’s] commitment to the core function of Alliance collective self-defense and the indispensable trans-atlantic link.”³⁰⁹ Since that optimistic pronouncement, the United States has suggested that “banishing weapons of mass destruction ... should be the ‘unifying’ threat that binds Europe and the United States in the post-Cold War era.”³¹⁰ The U.S. vision also insists that NATO must

³⁰⁷ See, e.g., *The Final Communiqué of the Ministerial Meeting of the North Atlantic Council in Sintra, Portugal*, NATO PRESS COMMUNIQUÉ M-NAC-1 (97) 65, May 29, 1997, covering topics ranging from NATO enlargement to establishment of a new Euro-Atlantic Partnership Council (EAPC) which merges the PFP and the NACC, to the Founding Act between NATO and Russia. Also included are discussions of a NATO-Ukraine Charter, Mediterranean dialogue, the ESDI, cooperation with the OSCE, and upcoming agreements on non-proliferation of weapons of mass destruction. Additional items on the agenda noted the Chemical Warfare Treaty, the Conventional Forces in Europe Treaty, the START treaties, and the Ottawa Process for eliminating anti-personnel land mines. This process prompts the observation from some quarters that the political dimension of NATO has become more important than the military aspect. See Mircea Geoana, *Romania: Euro-Atlantic Integration and Economic Reform*, 21 FORDHAM INT’L L.J. 12, 14-15 (1997). Nevertheless, the official line from the Alliance continues to be that it is purely a collective self-defense organization. See, e.g., *NATO’s Enlargement*, NATO BASIC FACTSHEET NO. 13 (last modified June 1997) <<http://www.nato.int/docu/facts/enl.htm>> [hereinafter NATO FACTSHEET NO. 13].

³⁰⁸ *Madrid Declaration on Euro-Atlantic Security and Cooperation*, NATO PRESS COMMUNIQUÉ M-1 (97) 81, July 8, 1997, para. 19.

³⁰⁹ *Id.*

³¹⁰ William Drozdiak, *U.S., Russia Clash Over Iraq Policy*, WASH. POST, Dec. 18, 1997, at A29.

expand its operations beyond its traditional borders and become "a force for peace from the Middle East to Central Africa."³¹¹

The European subset of the Alliance is not generally in agreement with the American assessment.³¹² Despite the present expedition to Bosnia, some European members are not keen on the prospect of pursuing peace operations away from the traditional NATO area of operations.³¹³ As late as the Gulf War, it was an article of faith that the Alliance would not act "out of area," and the NATO members remained true to form during the conflict.³¹⁴ The North Atlantic Treaty currently does not require such a commitment. As one recent study suggests, most European allies simply have neither the inclination nor the means to conduct out of area operations.³¹⁵ True to form, only Britain has offered direct support to the U.S. during the current Gulf crisis.³¹⁶

³¹¹ William Drozdiak, *European Allies Balk at Expanded Role for NATO*, WASH. POST, Feb. 22, 1998, at A27.

³¹² *Id.*

³¹³ *Id.* Reportedly, France expresses concern that expanding NATO's reach would make it little more than a global military tool for U.S. interests. A diplomat from another NATO country asked, "If NATO is changing a military destiny once based on geography to a defense of common values, then where do we draw the limits?" *Id.*

³¹⁴ There can be little doubt the Gulf War presented a clear threat to the interests of all the Allies. Western Europe as well as the U.S. procures more than one half of its petroleum needs from Southwest Asia, and the border of one ally, Turkey, was directly adjacent to the area of conflict. Yet, NATO members could not agree to deploy their forces as a united force. NATO settled for sending a small air defense force into Turkey. See Stromseth, *supra* note 25, at 495-96. See also *Final Communiqué of the North Atlantic Council Chairman*, NATO PRESS COMMUNIQUÉ, June 7, 1991, para. 8, <<http://www.nato.int/docu/comm/c910607a.htm>> (issuing self-congratulatory praise to the Alliance for its "political solidarity" and its "collective expression of support for the Ally facing a direct threat" and therefore "helping to deter a further expansion of hostilities"). Besides the U.S. (532,000 troops), Britain (35,000 troops) and France (13,500 troops) were the only NATO countries to send ground forces. Italy contributed some air forces as well (8 aircraft). See JOHN E. PETERS & HOWARD DESHONG, *OUT OF AREA OR OUT OF REACH?* 5-24 (1995).

³¹⁵ Drawing on the experiences of the Gulf War and surveying the aftermath, the study concluded: (1) few European countries demonstrated willingness to deploy out of area; (2) even the countries which deployed faced serious political opposition from their citizens over their involvement; (3) the allies do not have sufficient

Admittedly, this is a political question that argues against the likelihood of amending the treaty.³¹⁷ However, acknowledging the difficulty of amending the treaty does not alter the need for the change. The march of world events will call upon the Alliance to perform peace operations. The North Atlantic Treaty currently does not permit NATO to perform those missions, whether within or without the North Atlantic area. NATO should cease the current drift which permits an almost daily reinterpretation of its treaty and face squarely the

air or sea-lift capability to deploy and sustain significant forces; and, (4) even if they managed the deployment, uncoupling the forces from the other NATO structures, deploying, and then reconstituting their forces. See PETERS & DESHONG, *supra* note 314, at 24-27.

³¹⁶ See Swardson, *supra* note 14 (noting Britain's consistent support of the U.S. on its Iraqi policy). The other European allies have thus far limited their support to offers to allow the U.S. to utilize their bases to transport material and manpower to the Gulf region. See Edward Walsh, *U.S. Downs Iraqi Plan for Weapons Inspections*, WASH. POST, Feb. 12, 1998, at A34. The three candidate members for NATO have expressed support. They agreed to open up their bases, and possibly to contribute troops. Interestingly, the candidate members, Poland, the Czech Republic, and Hungary, also sent contingents to the Gulf during Desert Storm. See Christine Spolar, *East European NATO Aspirants Ready to Aid Possible Allied Military Strikes Against Iraq*, WASH. POST, Feb. 15, 1998, at A31.

³¹⁷ When the subject of out of area operations is broached, most point to the Germans as the source of the foot-dragging. For years the Germans claimed their Constitution and Basic Law for the Armed Forces prevented deployment of German forces beyond their country's borders in combat situations. See Stromseth, *supra* note 25, at 495-96. This was the excuse Germany employed in 1991 to justify its decision not to send forces to the Persian Gulf. This decision subjected Germany to so much questioning from other NATO members, however, that it may have influenced the government to modify its position. There is some evidence that the German government felt that its lack of participation in such operations might be harming its chances to become a permanent member of the Security Council in the event the Council was expanded. See Ehrhart, *supra* note 39, at 35. Beginning in April 1993, the German government allowed fire control officers to remain aboard NATO airborne warning and control aircraft (AWACS) enforcing the no-fly zone in Bosnia. The change was justified on the grounds that the AWACS were orbiting outside the combat zone and the mission was rendering "humanitarian aid." This and other decisions led the opposition party to protest that the ruling party was attempting to alter the law through creeping incremental changes. *Id.* Protests from the German opposition provoked a court battle, which eventually reached the Federal Constitutional Court (FCC) in 1994. The court concluded that German forces were constitutionally permitted to take part in NATO combat operations outside the German borders, and further, outside NATO borders if operating pursuant to collective security arrangements or UN authorization. The only limitations were that German forces could not operate outside the country as only a national force, and the German Parliament must approve the deployment either before or immediately after the action was taken. In reaching this decision, the FCC found that, although the North Atlantic Treaty did not literally permit NATO deployments outside the North Atlantic area, the organization's agreement to deploy to Bosnia acted as an "implicit" amendment to the treaty. Walter J. Lemanski, *The*

necessity for formally defining itself and its mission in today's world, as opposed to the world it faced in 1949.

Some observers suggest that evolution of NATO from an alliance predicated purely on collective self-defense to a collective peacekeeping organization is entirely consistent with the present treaty. Advocates point to Article 2 of the treaty, arguing that peacekeeping capability contributes to "promoting conditions of stability and well-being." They also argue that the consulting provisions of Article 4 allow for consideration of actions outside the strict limits of the North Atlantic area.³¹⁸ Finally, opponents of amending the treaty suggest that the Alliance should merely reinterpret the Article 5 language to permit out of area collective security despite the traditional understanding that it permits only collective self-defense. The reasoning seems to be that since the North Atlantic Council (NAC) provides strategic direction for NATO's military arm, and the NAC in turn receives its guidance from the member states, logically the NAC may reinterpret its treaty in whatever manner it chooses.

However, the changes to the form and function of the North Atlantic Treaty Organization have been so pervasive that the organization now registered with the UN seems

Reemergence of German Arms: How Far Will Germany's March Toward Full Use of Military Force Go?, 29 VAND. J. TRANSNAT'L L. 857, 870 (1996).

³¹⁸ See, e.g., 139 CONG. REC. E1576-02 (daily ed. June 22, 1993) (statement of Rep. Hamilton) ("As its history proves, the Treaty gives the Allies ample flexibility to take the steps necessary to pursue security and stability in Europe. The treaty is sufficiently flexible to permit the use of NATO forces for peacekeeping purposes"). Yet, ultimately Rep. Hamilton tied a NATO peacekeeping effort to the traditional collective self-defense purpose. "[T]he conditions that create the need for peacekeeping activity would be an appropriate subject for consultations if any of the Allies considered that the territorial integrity, political independence or security of any ally were threatened." *Id.* at 1578.

to be a different agency from the one contemplating peace operations beyond its role in Bosnia. Against its historical posture as a collective self-defense agency with interests only in the North Atlantic area, NATO is transforming itself into an entity that may conduct peace operations out of its traditional area. Instead of limiting its protective reach to its own members, NATO now offers itself in a broader scope to the Organization for Security and Cooperation in Europe. In essence, the members have developed a "secret treaty" which the UN, and before it the League of Nations, sought to prevent.³¹⁹

Cumulatively, these changes beg for formal amendment to the North Atlantic Treaty. The NATO members should not simply reformulate the Strategic Concept in April 1999, they should take the opportunity to reexamine the goals and purposes of the organization and make the needed changes to their charter, the North Atlantic Treaty.

By declaring itself a Chapter VIII regional organization, NATO will preserve its traditional freedom of action. Under the current state of customary international law, very little is prohibited to a legitimate regional concern. As the case studies presented earlier in this thesis demonstrate, collective action is not only condoned, it is also encouraged as long as the regional organization concerned has a sufficient legal basis for its action. The charter,

³¹⁹ U.N. CHARTER art. 102(1) states in pertinent part: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." *Id.* This provision is designed to prevent secret diplomacy which was blamed in part for the spread of conflict during the first World War, as each European nation was pulled in through the provisions of a secret compact it had concluded with its neighbor. Often the new combatant had no national interest at stake beyond the treaty obligation. See BENTWICH & MARTIN, *supra* note 140, at 177.

in this instance the North Atlantic Treaty, is NATO's legal contract between its members as presented to the rest of the world. The charter basis for regional action should be as clear as possible.³²⁰

C. *The Evolving Law on Intervention*

The time is quickly approaching when NATO members will not have the leisure to practice "the art of watching countries explode from a safe distance."³²¹ While Algeria festers in the south, refugees swarm into France.³²² Ethnic violence simmers around the Caspian Sea and cozies up to the border of Turkey.³²³ NATO enlargement produced candidate members with borders in close proximity with smoldering disputes.³²⁴ It is only a matter of time before some potential conflagration ignites into a war which will force the

³²⁰ See, e.g., Acevedo, *supra* note 216, at 119 (placing emphasis on the Charter of OAS not containing provisions to enforce economic sanctions against Haiti and therefore being unable to command compliance with its embargo on the Cedras junta); Wippman, *supra* note 148, at 183 ("...even if a particular subregional organization can legitimately claim to be a chapter VIII organization, its authority to use force against a member state depends on compliance with its own charter and rules ..."); Moore, *supra* note 22, at 157-164 (pointing out the uproar following Grenada as to whether regional action there was consistent with the OECS Charter). Cf. Damrosch, *supra* note 146, at 13. She writes, "The quest for *legitimacy* may begin, but need not end, with the powers and authorities granted to international institutions by their own charters, which by and large were written at a time when the perceptions of threats and needs were quite different from those of today. Existing institutions are being asked to take on functions that they were never intended to perform; they are being pushed to the limits of their own constitutions, or perhaps beyond them." *Id.*

³²¹ This phrase was borrowed from Philip Golub, *The Art of Watching Countries Explode from a Safe Distance*, ASIA TIMES, Mar. 25, 1997, at 9 (criticizing the West, especially NATO, for failing to stop large scale humanitarian crises along its immediate periphery until it is too late to do more than "pick up the pieces, once the damage has already been done").

³²² See *supra* note 11 and accompanying text.

³²³ See *supra* note 33 and accompanying text.

³²⁴ Poland borders on the Baltic nations which have unstable relations with Russia, and adjoins Belarus which is ruled by an autocratic holdover government from the communist era. See generally, Jusys & Sadaukis, *supra* note 273. The Czech Republic survived its "velvet divorce" with Slovakia, but the latter nation has its own potential problems. Cf. Christine Spolar, *Lacking President, Slovakia is in Deadlock*, WASH. POST, Mar. 3, 1998, at A11 (reporting the Slovakian premier's bid to enlarge his powers, questioning the progress of

Alliance from the sidelines. For example, a civil war is currently developing in Kosovo, a province in what remains of Serbian dominated Yugoslavia.³²⁵ If permitted to spread, it will likely disrupt the fragile peace in Bosnia and draw Albania and Macedonia into the conflict. Turkey and Greece, with their own well-known animosities, might also become involved.³²⁶

NATO is not only the logical security organization to deal with these threats, it is the sole association of states capable of doing so in the face of UN stalemate and pan-European

democratic reforms, and highlighting the plight of ethnic minorities, the media, and the courts under the current regime). Hungary borders on the war-torn Balkan region.

³²⁵ Kosovo's 90 percent ethnic Albanian population (Muslims) has sought separation since the province's autonomous status was stripped in 1989 by the central government. The action was considered a prelude to the Bosnian conflict, because it set the tone for the drive towards the creation of "Greater Serbia." Although the main independence party advocates passive resistance, a more violent form of Kosovan nationalism emerged over the past year prompting thinly veiled threats from Serbian authorities that what happened to Bosnian Muslims could occur in Kosovo as well. See Philip Smucker, *Serbia's Tinderbox of Ethnic Strife*, *Kosovo Seethes*, PITT. POST-GAZ., Feb. 3, 1997. Serbia has a deep attachment to Kosovo because of its historical and religious significance to the Serbian Orthodox faith. The Battle of Kosovo in 1389 resulted in a crushing defeat for the Serbian forces by the Ottoman Turks. For 500 years, the Serbians suffered religious, ethnic, and social persecution at the hands of their Muslim conquerors. Their leaders vow that present-day Serbs will not suffer the same fate. See William Dorich, Commentary, *A Balkan Story the Media Ignored*, WASH. TIMES, Dec. 21, 1997, at B5.

³²⁶ See, e.g., Philip Smucker, *More Albanian-Serbian Clashes Shake Yugoslav Region*, WASH. TIMES, Jan. 16, 1998, at A15 (warning of a sharp increase in violence in Kosovo accompanied by little diplomatic effort to stop it); Georgia Anne Geyer, Commentary, *Kosovo: The Balkan's Next Trouble Spot*, CHI. TRIB., Feb. 20, 1998, at 25 (predicting the "next Balkans" begins in Kosovo and noting the likelihood the violence would spread into Macedonia with its large Muslim minority); Guy Dinmore, *Albanian Rebels Fight with Serbian Police*, FIN. TIMES (London), Mar. 2, 1998, at 2 (reporting a Kosovan terrorist attack which in turn led to a Serbian crackdown in which twenty Kosovan civilians were killed; as the violence escalated the Albanian government warned that Serbia's actions created a "serious war situation"); Chris Hedges, *Serbia Police Crush Protest by Ethnic Albanians in Kosovo*, N.Y. TIMES NEWS, Mar. 3, 1998, available in 1998 WL-NYT 9806104804 (reporting a Serbian crackdown on civilian protests which followed the weekend massacre of 20 Kosovan civilians; the Serb government refused to negotiate with the Kosovan parties and warned western diplomats that Kosovo was "an internal affair"). A six-nation "Contact Group" composed of the U.S., Russia, Britain, France, Italy, and Germany were attempting to negotiate a diplomatic solution. The U.S. vowed to press its allies to impose new economic and diplomatic sanctions against Serbia, but cautioned that "the latest violence falls short of a threshold at which [it] would urge direct foreign military intervention." Jeffrey Smith, *U.S. Assails Government Crackdown in Kosovo*, WASH. POST, Mar. 5, 1998, at A23. NATO reportedly has hinted that direct military intervention is a possibility because of the potential impact of the Kosovan situation on the stability of the region. Colin Soloway, *Serbia Attacks Ethnic Albanians*, WASH. POST, Mar. 6, 1998, at A1.

vacillation. The law justifies NATO's emerging role, but the Alliance must muster the political will to act. The dual doctrines of democratic and humanitarian intervention have achieved sufficient recognition in express and customary international law to permit NATO the freedom of action it requires to undertake these missions.

The legal underpinning of democratic and humanitarian rights begins with the UN Charter itself, which is based on the principle of "respect for human rights and fundamental freedoms."³²⁷ Later, the UN's member nations, most of which at the time had a grounding in democratic tradition, made a non-binding declaration that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."³²⁸ Unfortunately, when the declaration was reduced to a binding agreement, the resulting convention watered down the Charter's vision to the point that most nations, even one-party states like the Soviet Union, felt no qualms about ratifying the agreement.³²⁹ Until the past decade, little progress was made towards democratic and humanitarian goals, as autocratic rulers were allowed to turn democratic ideals upside down

Russia, which has a representative on the "Contact Group," indicates it would not support forcible intervention. Colin Soloway, *Kosovo Under 2nd Day of Heavy Serb Assault*, WASH. POST, Mar. 7, 1998, at A1.

³²⁷ U.N. CHARTER art. 1(3).

³²⁸ *Universal Declaration of Human Rights*, art. 21(3), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 75, U.N. Doc. A/810 (1948).

³²⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1966), [hereinafter the ICCPR].

by hiding behind the concepts of "sovereignty," "domestic jurisdiction," and "internal affairs."³³⁰

When the United States invaded Panama, in part to restore the democratically elected Endara government, it suffered near unanimous disapproval.³³¹ In retrospect, the U.S. action signaled a change in the way the world viewed intervention to uphold democratic and humanitarian rights. In Europe, the OSCE's predecessor organization issued a series of proclamations strongly supporting both democratic³³² and humanitarian principles.³³³ Even

³³⁰ See W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794, 799-800 (1995).

³³¹ See G.A. Res. 240, U.N. GAOR, 44th Sess., at 1, U.N. Doc. A/RES/44/240 (1989) (condemning U.S. action in Panama even though elected government approved of the mission). See also CP/RES.534, OAS Permanent Council, OEA/ser.G/P/RES.534 (800/89) corr. 1 (1989) (mirroring the General Assembly's condemnation).

³³² See *Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension*, 29 I.L.M. 1305 (1990) [hereinafter the Copenhagen Document]. CSCE members "recognize that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights." *Id.* The Copenhagen Document lists seven characteristics of democratic systems and the rule of law: (1) free elections; (2) a representative government; (3) accountability of the executive to a legislature or electorate; (4) clear separation between state and political parties; (5) an independent judiciary; (6) military forces under civilian control; (7) other related human rights. *Id.* at 1308-09; *Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter*, Nov. 21, 1990, 30 I.L.M. 190, 193 (1991) [hereinafter the Charter of Paris]. The Charter of Paris states, "We undertake to build, consolidate and strengthen democracy as the only system of government of our nations. Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law ... Democracy is the best safeguard ... [for all these rights]." And, "Our states will cooperate with each other with the aim of making democratic gains irreversible." *Id.* at 195; *Document of the Moscow Meeting of the Conference on the Human Dimension Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Factfinding*, 30 I.L.M. 1670 (1991) [hereinafter the Moscow Document].

Article 17 of the Moscow Document states, "The participating states (1) condemn unreservedly forces which seek to take power from a representative government of a participating state against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order; (2) will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of legitimately elected government of a participating state by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values;

the OAS, normally the most conservative of organizations, made a powerful declaration in favor of democracy.³³⁴ Further, unlike the OSCE, which has no enforcement mechanisms or even a duty to consult following reported violations, the OAS amended its Charter to permit sanctions against the organization's members, which came to power by overthrowing democratic governments.³³⁵

These declarations prompted a number of observers to declare that the moral obligation to support human rights and democratic movements had become a legal duty.³³⁶ In

and (3) recognize the need to make further peaceful efforts concerning human rights, democracy and the rule of law within the context of security and co-operation in Europe, individually and collectively, to make democratic advances irreversible and prevent any falling below the standards laid down in the principles and provisions of the Final Act, the Vienna Concluding Document, the Document of the Copenhagen Meeting, the Charter of Paris for the New Europe and the present document." *Id.* at 1677.

³³³ See the Charter of Paris, *supra* note 332, at 193-195 ("We affirm that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination ..." See also the Moscow Declaration, *supra* note 332, at 1674-1676 (allowing experts to investigate suspected human rights violations with or without government consent and to offer advisory services with permission of the target government).

³³⁴ See the Santiago Declaration, *supra* note 219.

³³⁵ See *Protocol of Amendments to the Charter of the Organization of American States*, Dec. 14, 1992, 33 I.L.M. 1005 (1994) (allowing the OAS via Article 9 to suspend any member whose democratic government has been overthrown by force).

³³⁶ See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 89 (1992) (stating, "Democratic entitlement," building on "free and fair elections," is becoming the international standard); Tom Farer, *Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect*, 15 HUM. RTS. Q. 716, 721 (1993) (stating that placing pressure on non-democratic governments does not violate sovereignty because it resides with the people, not the government); Acevedo, *supra* note 216, at 141-42 (remarking that the Santiago Declaration signals consensus within the OAS community that democracy should be protected); Halberstam, *supra* note 147, at 166-67 (declaring that the Copenhagen Document implicitly authorizes military intervention to protect democracy); David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 260 (1992) (believing the "proliferation of international treaties and conventions" protecting human rights "has now reached a critical mass that imposes limits on national sovereignty"). For a view that democratic entitlement is not an emerging norm, see Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOCIETY INT'L L. PROC. 261, 264 (1992) (claiming "many nations do not practice democracy and do not ascribe to it as an aspiration").

principle, both the Secretary-General of the United Nations³³⁷ and the President of the United States endorsed these rights.³³⁸ More importantly, the entitlement to democratic governance and guarantees of human rights has been upheld in practice.³³⁹ The time is ripe for a clear expression in the North Atlantic Treaty regarding NATO's willingness to undertake human rights missions and to act as guarantor of democratic governments in and adjacent to the North Atlantic region.

1. The Imperative of Democratic Action--NATO's continued existence is predicated on exporting and maintaining the democratic ideal. The democratic standard is embedded in the North Atlantic Treaty,³⁴⁰ declared in the Alliance's current Strategic Concept,³⁴¹ and unanimously endorsed through its members' participation in the OSCE.³⁴² When the Soviet empire collapsed, U.S. officials promoted several reasons to retain the Alliance, including the

³³⁷ See *An Agenda For Peace*, *supra* note 50, para. 10 ("[R]espect for democratic principles at all levels of social existence is crucial; in communities, within States and within the community of States.").

³³⁸ See PDD 25, *supra* note 74, at 802-03 (stating the U.S. is willing to commit to regional action under certain circumstances where there is an urgent humanitarian disaster coupled with violence, or where there is a sudden interruption of an established democracy or a gross violation of human rights coupled with violence or threat of violence).

³³⁹ Humanitarian interventions have garnered wide support in Liberia, *supra* notes 193-215 and the accompanying text, Bosnia, *supra* notes 247-263 and the accompanying text, and Somalia, *see* S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg., U.N. Doc. S/RES/733 (1992). Haiti was the first multilateral intervention in support of the democratic right. *See supra* notes 216-236 and accompanying text.

³⁴⁰ See North Atlantic Treaty, *supra* note 1.

³⁴¹ See *The Alliance's New Strategic Concept*, *supra* note 28, para. 15 ("NATO's essential purpose ... is to safeguard the freedom and security of all its members by political and military means ... based on common principles of democracy, human rights and the rule of law ...").

³⁴² See *supra* notes 332, 333 and accompanying text.

theory that NATO has a “proven record of sustaining democracy.”³⁴³ NATO has acted consistently with that policy.

When the Alliance established the PFP, it required prospective members to commit to promoting democratic principles and to establishing civilian control over their military forces.³⁴⁴ These same principles became prerequisites to membership during NATO enlargement.³⁴⁵ They are even reiterated in the Founding Act.³⁴⁶

Under these circumstances, it is a logical extension of the North Atlantic Treaty to include a contract between its members to permit intervention into a member state if its democratically elected government is irregularly removed by armed force. This right may be lawfully conferred by treaty, even to the extent of permitting the use of armed force.³⁴⁷ Democratic intervention should be regarded as the price of admission into the Alliance. It ensures that NATO will not be forced to suffer a viper amongst its members. It also extends

³⁴³ See, e.g., Strobe Talbott, *Russia Has Nothing to Fear*, NY TIMES, Feb. 18, 1997, at A19; Jusys & Sadauskas, *supra* note 273, at 1643 (asserting the belief that NATO enlargement extends universal democratic values beyond Europe’s limits and may contribute to the development of democracy within Russia, despite itself); Geoana, *supra* note 307, at 13 (arguing that NATO membership ensures the democratic stability of its neighbors).

³⁴⁴ *Partnership for Peace*, NATO BASIC FACTSHEET NO. 9 (last modified Mar. 1996) <<http://www.nato.int/docu/facts/fs9.htm>>.

³⁴⁵ See NATO FACTSHEET 13, *supra* note 307, at 2.

³⁴⁶ See FOUNDING ACT, *supra* note 43, at 1 (“NATO and Russia, based on an enduring political commitment undertaken at the highest political level, will build together a lasting and inclusive peace in the Euro-Atlantic area on the principles of democracy and cooperative security.”).

³⁴⁷ See BROWNIE, *supra* note 183, at 321 (“In general, the right of forcible intervention on the territory of a state may still be lawfully conferred by treaty.”). See also Farer, *supra* note 188, at 332; David Wippman, *Treaty Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 670 (1995).

protection of this most basic of human rights to the fledgling democracies joining NATO, most of which have a short acquaintance with democratic governance.

A treaty provision guaranteeing a democratic form of government for NATO's members takes a sensible middle approach to the issue of democratic intervention. It satisfies the critics' protests that the Haiti mission does not signal democratic intervention as an accepted international norm, while avoiding an extreme call for unilateral intervention in support of a popular government.³⁴⁸ NATO's advantage is that its members have a clearly understood standard with which to gauge democratic institutions. Unlike the compromise which produced a meaningless definition of democratic rights in the International Covenant on Civil and Political Rights, NATO members should have no trouble defining democracy. The result is that if democracy is subverted in a member nation, there will be no disagreement over whether a treaty violation has occurred.

Critics who maintain that Haiti was an anomaly point to the unique factors in that situation which led the Security Council to authorize intervention. Specific details include intimate involvement by the UN and the OAS in the electoral process and the organizations'

³⁴⁸ See David Wippman, *Defending Democracy Through Foreign Intervention*, 19 HOUS. J. INT'L L. 659 (1997). Professor Wippman believes democratic intervention is not a broadly accepted right. He also considers it unlikely to become one soon because there is no wide consensus on what democratic norms entail. Professor Wippman notes that despite recent advances international law is still highly biased towards claims of sovereign rights. Finally, he believes that the biggest road-block may be the overall lack of resources and political will to assert the right. Therefore, without Security Council approval, Professor Wippman says only state consent will permit forcible intervention. *Id.* at 671. *But see* Reisman, *supra* note 330, at 801-02. Professor Reisman asserts that democracy is *the* basic human right, and that unilateral initiatives may be the only available method to redeem the privilege. Therefore, "in the short run effective international protection of fledgling democracies

responsibility for the economic plight of the Haitian people who suffered immensely because of the embargoes. The critics say that intervention occurred because the international community had staked its reputation on delivering a solution in Haiti.³⁴⁹ The NATO advantage is the democratic tradition it has fostered. NATO has staked its continued existence and membership on establishing democracy in its member states and advancing democracy elsewhere. Shaping a clear doctrine of democratic intervention within the North Atlantic Treaty creates the same international expectation that NATO will deliver and protect democracy amongst its members.

A related issue to establishing a democratic intervention doctrine in the treaty is the probability that a newly installed junta would move to revoke the consent granted by its democratic predecessor. This creates two related topics. One is the question of when and by whom consent can be withdrawn. The other is whether the rogue state could prevent NATO action against it by blocking consensus.

The general rule is that the sitting government speaks for the state.³⁵⁰ Carried to a strict conclusion, this permits a despot to overthrow a democratically elected government and then set up the concepts of "sovereignty," and "non-intervention in a state's internal affairs" as an absolute bar to intervention. In an effort to avoid this distasteful denouement, one

will depend on decisive action by the great industrial societies." *Id.* at 803. He maintains that only in this manner will customary international law develop to protect the rights of free peoples. *Id.*

³⁴⁹ See Wippman, *supra* note 348, at 676-77.

³⁵⁰ *Id.* at 672-674.

commentator suggests a theory of "concurrent consent" which holds that in the case of an overthrow consent "could be revoked only by a government representing the unified will of the state, or, in the event of sufficient political division within the state, by the consent of the competing centers of authority."³⁵¹ Of course, it would be a rare instance where the unconstitutional overthrow of an elected government did not result in a break in the unified will of the state sufficient to block unilateral revocation of the treaty.³⁵²

Another commentator suggests a treaty provision requiring six months notification prior to withdrawing consent.³⁵³ This cooling off period would give the treaty organization sufficient time to formulate a response. Both theories support NATO's ability to act in the face of opposition by a *de facto* sitting government brought to power over the body of a democratically elected government. NATO's consensus method of decision-making should calm observers' fears that its actions were primarily motivated by one hegemonic force.³⁵⁴

Of course, consent would be meaningless if the target state was allowed to block a consensus decision by the other treaty members. NATO currently requires unanimous

³⁵¹ See Wippman, *supra* note 347, at 676. In a later article the author seems to revise his stance on this issue by emphasizing the sitting government's sovereignty rights. Perhaps the distinguishing feature is that the second article primarily addresses what occurs if the *de jure* government consents after the overthrow, rather than in advance. Such was the case in Haiti. Compare Wippman, *supra* note 348, at 677.

³⁵² See Wippman, *supra* note 347, at 677.

³⁵³ See Farer, *supra* note 188, at 341.

³⁵⁴ See *supra* note 146 and accompanying text which discusses the modifying influence of collective action.

agreement by its members before it may take action.³⁵⁵ In order to prevent stalemate at the NAC, the treaty should be revised to reflect either an alternate approach to decision-making, such as "consensus minus one," or NATO should borrow an idea from the OAS Charter and mandate automatic suspension of a member following an unconstitutional overthrow of a democracy.³⁵⁶

NATO also should not hesitate to act when non-democratic forces overthrow democratic governments in the regions immediately adjacent to the North Atlantic area. Although it is unlikely neighboring governments will request NATO intervention, the concept of universal democratic rights is no less valid among non-NATO members as it is within the Alliance. Accordingly, NATO should revise its treaty to serve notice that it will react when undemocratic forces threaten regional peace.

2. *NATO and Human Rights*--While democratic governance may well be the primary human right from which all others flow,³⁵⁷ wider acceptance of other basic human rights concepts has also generated broader support for humanitarian intervention.³⁵⁸ Perhaps the

³⁵⁵ See NORTH ATLANTIC TREATY ORGANIZATION, NATO HANDBOOK 94-6 (1995) ("When decisions have to be made, action is agreed upon the basis of unanimity and common accord. There is no voting or decision by majority.").

³⁵⁶ See OAS Charter, *supra* note 190, article 9.

³⁵⁷ See Reisman, *supra* note 330, at 795 ("It should not take a great deal of imagination to grasp what an awful violation of the integrity of the self it is when men with guns evict your government, dismiss your law, kill and destroy wantonly and control you and those you love by intimidation and terror. When that happens, all the other human rights that depend on the lawful institutions of government become matters for the discretion of dictators ... Military coups are terrible violations of the political rights of all the members of the collectivity, and they invariably bring in their wake the violation of all the other rights.").

³⁵⁸ See Wippman, *supra* note 347, at 679.

reason is because nations more readily perceive that the mass migration of refugees which often accompanies internal repression or disasters constitutes a threat to international peace and security.³⁵⁹

Fleeing war and repression, millions of refugees have crossed the borders into Western Europe since 1989.³⁶⁰ In Germany alone, Kurdish refugees from Turkey and Iraq have increased 600 percent in the last four years. The arrival of so many in such a short period of time not only taxes the resources of the receiving states, but it also frays relationships among allies.³⁶¹ Under these circumstances, NATO intervention could be viewed as a form of self-defense.³⁶² Of course, given the "threat to international peace" analysis currently employed by the international community, it is unnecessary to find that NATO is acting in self-defense of its own members in order for the Alliance to act. Nevertheless, the additional self-defense analysis may help NATO members identify

³⁵⁹ See Scheffer, *supra* note 336, at 273. See also Wippman, *supra* note 348, at 672-73 (perceiving that the Security Council has lowered the threshold for what constitutes a "threat" by granting authority to use force in Iraq, Somalia, Rwanda, Haiti and Bosnia).

³⁶⁰ John Pomfret, *Europe's 'Rio Grande' Floods with Refugees* WASH. POST, July 11, 1993, at A1. See also William Drozdiak, *New Wave of Fleeing Kurds Highlights Europe's Vulnerability*, PITTSBURGH POST-GAZETTE, Jan. 11, 1998, at A3. For example, the numbers include 120,000 Moroccans to Spain, 600,000 Algerians to France, and 300,000 refugees fleeing to Germany alone during the Bosnian war. *Id.*

³⁶¹ Many of the refugees make their way to Germany which provides liberal benefits to newcomers. The Germans complain that their neighbors do little to halt the flow. See Elizabeth Neuffer, *BOSTON GLOBE*, Feb. 5, 1998, at A1. See also Peggy Polk, *Italy to Get Help with Influx of Yugoslav Refugees*, CHICAGO TRIB., Sept. 22, 1991, at 5 (detailing problems Italy encountered with refugees at the beginning of the conflict in the former Yugoslavia).

³⁶² See Brian K. McCalmon, Note, *States, Refugees, and Self-Defense*, 10 GEO. IMMIGR. L.J. 215, 229 (1996) (arguing the deliberate actions of "sending" states which cause massive cross-border flows of refugees places enormous burdens on the security of the "receiving" state triggering the inherent right of self-defense in the latter state).

humanitarian missions warranting the organization's involvement, and upon which the NAC may reach the required consensus.

For example, Serbian assaults on alleged ethnic Albanian terrorists in Kosovo recently created an estimated 5,000 refugees in a matter of days.³⁶³ While the bordering country of Albania, itself recovering from near civil war last year, scrambled to prepare to receive its neighbors, Europe's response was typically cautious.³⁶⁴ Meanwhile, the danger that Greece and Turkey could be drawn into a broader conflict on opposing sides increased.³⁶⁵ This is a clear situation in which a mandate in NATO's charter to address regional humanitarian concerns as a threat to regional peace would provide the tools and political direction the Alliance needs to deal with this type problem before it spirals out of control.

Another element dictating NATO involvement in humanitarian missions is the degree of media interest created by widespread disasters. This is often referred to as the "CNN factor."³⁶⁶ NATO will confront situations necessitating humanitarian involvement more often

³⁶³ R. Jeffrey Smith, *Eerie Quiet Follows Assault in Kosovo*, WASH. POST, Mar. 9, 1998, at A13.

³⁶⁴ See Christine Spolar, *Albania Prepares to Receive Refugees*, WASH. POST, Mar. 9, 1998, at A13. Eventually the Allies agreed to send humanitarian supplies to Albania, but NATO refused to deploy a peacekeeping force. William Drozdiak, *NATO, Albania Discuss Kosovo*, WASH. POST, Mar. 12, 1998, at A19. Although military planners conceded it was "likely" NATO forces would intervene if the conflict widened to prevent Greece and Turkey from taking sides, the members declined to authorize a preventive deployment such as the ongoing mission in Macedonia. *Id.* For additional information regarding the success of the Macedonian mission, see R. Jeffrey Smith, *U.S. Fine-Tunes Focus of Macedonia Mission*, WASH. POST, Apr. 1, 1998, at A24.

³⁶⁵ See, e.g., Drozdiak, *supra* note 364.

³⁶⁶ See, e.g., Jeffrey Clark, *Debacle in Somalia: Failure of the Collective Response*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 205 (Lori Fisler Damrosch ed., 1993) (crediting the electronic media with being the catalyst for international intervention in Somalia). See also Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, 17 SUM

than it faces a need to perform democratic intervention.³⁶⁷ NATO's membership is composed of many of the wealthiest and most technologically capable nations on Earth. Even if the members are not willing to become "the world's policemen" they have a moral obligation to relieve egregious human suffering in their area of competence and along the periphery of Europe. Chances are the electronic media will continue to provide the motivation in these instances when the political spirit would otherwise be weak.

At times NATO will be blessed with the consent of the sitting government or governments and the approval of the Security Council as it was in Bosnia. Unfortunately, it will often face host government opposition and Council deadlock. When that happens NATO must be prepared to "go it alone." An amended, revitalized North Atlantic Treaty should commit its members to such missions and clearly state the criteria for NATO involvement in humanitarian ventures.³⁶⁸

FLETCHER F. WORLD AFFAIRS 199, 206-07 (1993) (asserting "there was little hope of assistance and protection for the victims of ethnic cleansing in Bosnia until television" prompted international response).

³⁶⁷ Humanitarian intervention can take place in a wide variety of situations from protecting religious and ethnic minorities, to ending large scale atrocities, to responding to mass suffering caused by natural or man-made disasters. See Scheffer, *supra* note 336, at 265.

³⁶⁸ One suggested template is that intervention should occur when the humanitarian need is overwhelming, immediate action is required, and there is a clear threat to the security of a neighboring state or to regional stability. *Id.* at 290.

VI. Amending the North Atlantic Treaty

Article 12 permits the members to review the treaty for possible amendment.³⁶⁹ The North Atlantic Council should consider the amendments which follow during the April 1999 NATO summit.

A. Article 1

The initial amendment should add the following language at the end of the paragraph: "Within the United Nations, the North Atlantic Treaty Organization is a regional agency with all the rights conferred by Chapter VIII of the UN Charter and according to the customary law of nations."

This language makes it clear that NATO is an independent regional organization with all the rights and duties attendant to that status. It eliminates the necessity of borrowing the OSCE's jurisdictional authority to pursue peace operations within the Euro-Atlantic theater. At the same time NATO's designation as a Chapter VIII regional organization preserves its traditional freedom of action by claiming the broad rights now enjoyed by such organizations under customary international law.³⁷⁰ The result is to update NATO from a post-World War II collective defense organization to a twenty-first century collective security agency.

³⁶⁹ North Atlantic Treaty, *supra* note 1, art. 12.

³⁷⁰ "NATO is an organization in which political authorities have clear primacy over the military [while] they accept the overarching competence of the UN ... to provide the necessary political mandate for and international legitimacy of any peace operation ... if NATO accepts responsibility for the military aspects of a particular operation, it will be on the basis of partnership with the UN ... not merely as a subcontractor ..." Rader, *supra* note 6, at 154.

B. Articles 2a and 2b

Between current Articles 2 and 3, two new articles should be added. The first article should state: "The Parties recognize representative democracy as the only system of government for member states and an indispensable element to peace and security in the North Atlantic region and the Euro-Atlantic region immediately adjacent thereto. In case of overthrow or attempted overthrow of a legitimately elected government of a Party state by undemocratic means, the affected member state consents to collective action, including forcible intervention, by the other Parties to ensure democratic advances are irreversible."

This article codifies the right of democratic intervention. The first sentence is drawn directly from the language of the Copenhagen Document, the Charter of Paris, and other declarations in support of representative democracy.³⁷¹ It clearly establishes representative democracy as part of the "price of admission" into the Alliance. It also places non-members in the region on notice that NATO will react when undemocratic forces threaten regional peace.

The second sentence grants NATO the unequivocal right to use force in order to preserve democracy in all member states. When combined with the suggested additions to article 9 detailed below, it gives NATO members a wide range of options to respond to political crises in member states. The right of forcible intervention distinguishes the amended North Atlantic Treaty from the other conventions which purport to protect

democratic rights. While the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are mainly aspirational, or easily circumvented, this amendment provides no loopholes for corrupt regimes.

The second additional article should state: "The Parties recognize that protection of basic human rights is a moral obligation of all nations. Systematic violations of human rights constitute a threat to regional peace. Under appropriate circumstances and in accordance with the organization's own procedures, the Parties will offer their good offices to arrange and enforce the peace in the Euro-Atlantic area adjacent to the North Atlantic area which suffer urgent humanitarian disasters coupled with violence."

This article codifies the concept of humanitarian intervention. The first two sentences of the article place regional governments on notice that NATO may respond to systematic human rights violations when they have trans-border effects. Recent developments in the law indicate this power will give the Alliance broad discretion to perform humanitarian missions. For instance the Security Council has found a "threat to international peace" in a wide variety of situations which would once have been considered purely internal matters.³⁷² The phrase "humanitarian disasters" in the final sentence is a term of art which encompasses both man-made and natural disasters.³⁷³

³⁷¹ See *supra* notes 332-335 and accompanying text.

³⁷² See *supra* note 359 and accompanying text.

³⁷³ See, e.g., Scheffer, *supra* note 336, at 265.

C. Article 3

The following phrase should be added to the end of Article 3: "... and provide collective security in the North Atlantic region and the Euro-Atlantic region immediately adjacent thereto." This phrase unmistakably moves NATO beyond collective self-defense to define its new mission as collective security. It places rogue nations on notice that NATO is prepared to perform out of area missions when there is a threat to regional peace and security.

D. Article 9

Two additional sentences should be added to Article 9. They should read as follows: "But in the event the representative government of a Party state is overthrown by unconstitutional means, the Council, excluding the affected Party, shall immediately meet to consider suspending the affected Party from participating in the organization, and to consider an appropriate response. The affected Party shall have no vote in these deliberations."

The first additional sentence is modeled on the Santiago Declaration³⁷⁴ and Article 9 of the OAS Charter.³⁷⁵ It requires that NATO members convene immediately if a member state's democratic government is removed by unconstitutional means. Although it does not require forcible intervention by NATO forces, members may consider armed response in accordance with Article 2a detailed above. The second additional sentence ensures the

³⁷⁴ See *supra* note 219.

³⁷⁵ See *supra* note 335.

affected state cannot block deliberations by invoking NATO's traditional consensus method of decision-making.

VII. Conclusion

[T]he time has come to recognize what the UN cannot do. Although the UN is still capable of traditional peace-keeping, it is not capable of effective peace enforcement against well-armed opponents who are not prepared to cooperate. This was amply demonstrated in Somalia and the UNPROFOR's experience in Bosnia. For the foreseeable future, the defeat of aggression and the enforcement of peace will have to be undertaken by U.S.-led "coalitions of the willing" as in Desert Storm, or by NATO-led coalitions such as IFOR in Bosnia.³⁷⁶

NATO enjoys advantages that neither the UN nor any other regional organization in the world can claim. It has wealth, technological superiority, and a professional force structure honed by years of training together. The Alliance is firmly grounded in the moral strength of its common democratic ideology. What NATO currently lacks is the political will and the freedom of action it requires to perform peace operations without oversight from other international organizations.

The political dimension will take care of itself. Necessity will require NATO to perform peace operations despite the conservative tendencies of its European members. The Alliance assured itself of that by voting to enlarge its membership. In turn, enlargement places the Alliance in the middle of traditional religious and ethnic strife and nudges the "North Atlantic" borders towards numerous trouble spots on its periphery.

³⁷⁶ See ADDRESS BY AMBASSADOR RICHARD GARDNER, *supra* note 101, at S12461.

The North Atlantic Treaty, basically unchanged in almost fifty years, was written for the world of the 1940's. It does not address the world of the 1990's and beyond. It does not account for the evolution of international law. Amendment is necessary to develop the legal framework for peace operations, and to restore the clarity of vision the Alliance requires when it performs those missions in the twenty-first century.

APPENDIX A

PROPOSED REVISIONS TO NORTH ATLANTIC TREATY

Article 1

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations. Within the United Nations, the North Atlantic Treaty Organization is a regional agency with all the rights conferred by Chapter VIII of the UN Charter and according to the customary law of nations.

Article 2a

The Parties recognize representative democracy as the only system of government for our nations and an indispensable element to peace and security in the North Atlantic region and the Euro-Atlantic region immediately adjacent thereto. In case of overthrow or attempted overthrow of a legitimately elected government of a Party state by undemocratic means, the affected member state consents to collective action, including forcible intervention, by the other Parties to ensure democratic advances are irreversible.

Article 2b

The Parties recognize that protection of basic human rights is a moral obligation of all nations. Systematic violations of human rights constitute a threat to regional peace.

Under appropriate circumstances and in accordance with the organization's own procedures, the Parties will offer their good offices to arrange and enforce the peace in the Euro-Atlantic area adjacent to the North Atlantic area which suffer urgent humanitarian disasters coupled with violence.

Article 3

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack, and provide collective security in the North Atlantic region and the Euro-Atlantic region immediately adjacent thereto.

Article 9

The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organized as to be able to meet promptly at any time. The Council shall set up subsidiary bodies as may be necessary; in particular it shall establish immediately a defense committee which shall recommend measures for the implementation of Articles 2a, 2b, 3,

and 5. But in the event the representative government of a Party state is overthrown by unconstitutional means, the Council, excluding the affected Party, shall immediately meet to consider suspending the affected Party from participating in the organization, and to consider an appropriate response. The affected Party shall have no vote in these deliberations.